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## COMMENTS

### THE INDIAN CHILD WELFARE ACT AND EQUAL PROTECTION LIMITATIONS ON THE FEDERAL POWER OVER INDIAN AFFAIRS

John Robert Renner\*

#### *Introduction*

*[T]he individual Indian can reject the entire complex of special legal relationships. He can for all legal purposes cease to be an Indian whenever he wants to do so. He can do this most simply by giving up his tribal membership. . . . Once an Indian has severed his tribal relations he no longer comes within the scope of the Federal power to regulate commerce and make treaties with Indian tribes.*

— Felix Cohen<sup>1</sup>

Congress enacted the Indian Child Welfare Act of 1978 (ICWA)<sup>2</sup> in response to congressional committee findings that state courts were removing an unwarranted proportion of Indian children from their families and placing the children in non-Indian environments.<sup>3</sup> The ICWA attempts to remedy the problem by creating exclusive tribal jurisdiction over all proceedings involving Indian children residing or domiciled on a reservation,<sup>4</sup> and by providing for the transfer of foster care placement and parental rights termination proceedings involving an "Indian child" from state to tribal court — at the request of either parent, of an "Indian custodian," or of the child's tribe.<sup>5</sup> Additionally, the ICWA requires that state and federal courts give full faith and credit to tribal court decrees.<sup>6</sup>

In cases where the state court retains jurisdiction, the ICWA

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1. Felix S. Cohen, *Indians are Citizens!*, 1 AM. INDIAN 12, 13-14 (1944).

2. Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1963 (1988)).

3. 25 U.S.C. § 1901 (1988).

4. *Id.* § 1911(a).

5. *Id.* § 1911(b).

6. *Id.* § 1911(d).

requires that the court apply a special standard of proof before it can order a placement or termination.<sup>7</sup> When the court does make an adoptive or foster care placement, the ICWA provides that Indian environments be given preference.<sup>8</sup> The second subchapter of the ICWA authorizes family service programs on reservations.<sup>9</sup> The ICWA does not specifically provide funding.

In the 100th Congress, Senator Daniel Evans of Washington introduced legislation (Senate Bill 1976) designed to expand the scope of the ICWA.<sup>10</sup> In an effort to increase state compliance with the original Act and to further decrease the still disproportionately high rate of Indian parent-child separations, the bill would have changed the definitions of "child custody proceeding"<sup>11</sup> and "Indian child,"<sup>12</sup> increasing the number of children subject to the ICWA's provisions. The section of the original Act which allows either parent to object and block transfer from state to tribal court would have been largely removed,<sup>13</sup> as would the section that permits a state court to find "good cause" to deny transfer.<sup>14</sup> Further, Senate Bill 1976 would have altered the rules that apply when the state retains jurisdiction. For example, parental alcohol abuse and "non-conforming social behavior" would have been inadequate to justify removal unless the court finds a "direct causal relationship between the particular conditions and . . . serious emotional or physical damage to the child."<sup>15</sup>

Senate Bill 1976 died in committee at the conclusion of the 100th Congress in December 1988, and has not yet been reintroduced (although the Senate Select Committee on Indian Affairs had suggested that a similar legislative package would be brought before the 101st Congress).<sup>16</sup> However, an examination of Senator Evans' bill

7. *Id.* § 1912(e) (requiring "clear and convincing evidence" before foster care placement may be ordered); *id.* § 1912(f) (requiring evidence "beyond a reasonable doubt" before parental rights may be terminated).

8. *Id.* § 1915.

9. *Id.* §§ 1931-1934.

10. S. 1976, 100th Cong., 1st Sess. (1987), reprinted in *Indian Child Welfare Act: Hearing before the Select Committee on Indian Affairs, United States Senate*, 100th Cong., 2d Sess. 3-45 (1988) [hereinafter *1988 Hearing*]. The bill was cosponsored by five out of the seven other members of the committee, including the chairman, Senator Inouye. Senator Evans was the ranking republican member.

11. S. 1976, 100th Cong., 1st Sess. § 4(1) (1987). Compare *id.* with 25 U.S.C. § 1903(1) (1988).

12. S. 1976, § 4(5). Compare *id.* with 25 U.S.C. § 1903(4) (1988).

13. S. 1976, § 101(b). Compare *id.* with 25 U.S.C. § 1911(b) (1988).

14. S. 1976, § 101(b).

15. *Id.* § 102(g).

16. Senator Evans did not run for reelection in 1988. *National Desk, Special to the New York Times: Washington State Picks Senate Foes*, N.Y. TIMES, Sept. 22, 1988, at A31. The information on the status of Senate Bill 1976 was obtained by telephone from the committee staff.

remains useful because it sheds light on existing problems in the present ICWA, and involves issues that will likely figure in any future legislation.

Both the ICWA (at least in its early forms when it was worked on and amended in committee) and Senate Bill 1976 have been criticized on the grounds that they unconstitutionally deny access to state courts on the basis of race.<sup>17</sup> Critics have similarly objected to the standard of proof requirements and placement preferences.

This comment argues that while the original ICWA was for the most part an appropriate federal regulation of tribal Indian affairs, the proposed amendments go beyond *tribal* Indians to regulate *ethnic* Indians in a manner that violates the equal protection component of the Fifth Amendment.<sup>18</sup> Although Congress has broad authority to regulate Indian affairs, an authority based largely on the Indian Commerce Clause,<sup>19</sup> Congress cannot exercise unlimited power. At some point in a spectrum, as a law ceases to concern reservations or Indian tribes and focuses its attention on Indians lacking significant contacts with these societies, the Equal Protection Clause should limit the law's scope. We need to reconcile the existence of separate Indian reservations in our federal system with our legal and societal norms against racial discrimination. This comment seeks to define the margin between acceptable regulation of Indian affairs and inappropriate racial discrimination, in the context of the ICWA.<sup>20</sup>

Part I provides a background to the constitutional issues raised by the existing and proposed legislation. Section A examines the constitutional basis for the "plenary" federal power over Indian affairs. Section B next reviews the historical framework of federal Indian policy. Section C then discusses the nature of the Indian child sep-

17. Many of the underlying issues were laid out in a dispute between the Department of Justice and the House and Senate committees in 1978 about the constitutionality of earlier versions of the Indian Child Welfare legislation. The relevant materials are reproduced in the House Report on the ICWA. H.R. REP. NO. 1386, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530 [hereinafter H.R. REP. NO. 1386]. Compare Letter from Assistant Attorney General Patricia Wald to the Hon. Morris Udall 35-38 (Feb. 9, 1978) and Letter from the Assistant Attorney General 38-41 (May 23, 1978), *reprinted in* H.R. REP. NO. 1386, with H.R. REP. NO. 1386, *supra*, at 12-19. In general, this comment agrees with the position of the Department of Justice.

18. U.S. CONST. amend. V; see *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive . . . discrimination may be so unjustifiable as to be violative of due process.").

19. U.S. CONST. art. I, § 8, cl. 3.

20. For a related effort in the context of tribal criminal jurisdiction, see Patricia Owen, Note, *Who is an Indian?: Duro v. Reina's Examination of Tribal Sovereignty and Criminal Jurisdiction over Nonmember Indians*, 1988 B.Y.U. L. REV. 161.

aration crisis, explains why the situation provoked a congressional response, and how it fits into the historical framework. Part II first examines the most significant Indian "equal protection" cases. The jurisdictional and substantive provisions of the ICWA are then measured against the standards that have been set up by the federal courts. Part III looks at the principal changes between the amended and original versions of the ICWA to demonstrate that genuine and substantial constitutional objections have been raised to Senate Bill 1976. Finally, the comment concludes by suggesting that, at least in the present context, the consent of the affected individual should ultimately serve as the dividing line between Congress' plenary power over Indian affairs and the Fifth and Fourteenth Amendment prohibitions against racial discrimination.

### I. *Historical Background*

This section briefly describes the legal and historical relationship between the states, the Indian tribes, and the national government in our federal system. The ICWA and the Indian family crisis that spawned it are placed within this tripartite regime.

#### A. *"Plenary" Federal Power*

The Constitution as adopted in 1789 mentioned Indians only two times: once where "Indians not taxed" were excluded from federal representative apportionment;<sup>21</sup> and again, under Congress' enumerated powers — "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."<sup>22</sup> The latter provision has most often been used as the constitutional basis for congressional regulation of Indian affairs.

Chief Justice John Marshall laid out the extent of this federal power in the seminal cases of *Cherokee Nation v. Georgia*<sup>23</sup> and *Worcester v. Georgia*.<sup>24</sup> In *Worcester* the Court invalidated a Georgia statute extending state laws and state jurisdiction over the Cherokee Nation. Georgia had imprisoned two white missionaries, Samuel Worcester and Elizur Butler, under a sentence of four years at hard labor for entering the Cherokee Nation without the consent of the

21. U.S. CONST. art. I, § 2, cl. 3 (immediately preceding "three fifths of all other Persons.").

22. *Id.* § 8, cl. 3.

23. 30 U.S. (5 Pet.) 1 (1831) (denying jurisdiction in the Cherokee Nation's suit to enjoin the State of Georgia from enforcing its laws within the Nation's boundaries).

24. 31 U.S. (6 Pet.) 515 (1832). See generally Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969) (a comprehensive history of the Cherokee cases and of federal Indian policy during the removal period).

state authorities. Based in part on his analysis of the history of Indian relations with Great Britain and later with the United States, and in part on a comparison of the Constitution with the Articles of Confederation,<sup>25</sup> the Chief Justice concluded that the Constitution simultaneously delegated broad power over Indian affairs to the national government, while denying it to the states: "These powers [the war power, the treaty-making power, and the Indian commerce power] comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions."<sup>26</sup> The Court relied on this federal preemption of authority to invalidate the Georgia law.

While President Andrew Jackson (elected as a proponent of Indian removal) highly criticized the decision,<sup>27</sup> Marshall's doctrine actually proved to be a two-edged sword. The President and Congress used the strong federal power the Court had now endorsed to remove the Cherokee and the other eastern tribes to territories west of the Mississippi.<sup>28</sup> Language in the Cherokee cases endorsing tribal sovereignty and federal guardianship responsibilities, however, makes it clear that Marshall would have preferred a very different result.<sup>29</sup>

Other provisions of the Constitution have, at least in the past, supplemented the Indian Commerce Clause as a source of federal authority. Marshall mentioned two: the war power<sup>30</sup> and the President's power to sign treaties.<sup>31</sup> In the first century of the nation's existence both were significant. The Secretary of War had authority

25. See U.S. ARTICLES OF CONFEDERATION art. IX, cl. 4 ("The United States in Congress shall also have the sole and exclusive power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated. . . ."). Marshall could have found additional support for his view in *THE FEDERALIST* No. 42, at 215 (J. Madison) (G. Wills ed. 1982) (arguing that the Constitution was intended to transfer exclusive control of trade with the Indians to the central government); see also *Cherokee Nation*, 30 U.S.(5 Pet.) at 19 ("Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it as granted in the confederation.").

26. *Worcester*, 31 U.S. (6 Pet.) at 559.

27. Jackson is reported to have stated (probably apocryphally), "John Marshall has had his decision, now let him enforce it." The Court's decree was never enforced, although Georgia pardoned the missionaries the following year. Burke, *supra* note 24, at 525, 530.

28. See, e.g., Laurence H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1467-68 (1988).

29. For more direct evidence of Marshall's opposition to removal, see Letter from John Marshall to Dabney Carr (June 26, 1830), reprinted in 2 JOHN P. KENNEDY, *MEMOIRS OF THE LIFE OF WILLIAM WIRT, ATTORNEY-GENERAL OF THE UNITED STATES* 296-97 (1849).

30. U.S. CONST. art. I, § 8, cl. 11.

31. U.S. CONST. art. II, § 2, cl. 2.

over Indian affairs from 1786 until 1849, when an act of Congress transferred the subject to the Department of the Interior.<sup>32</sup> Active fighting between the government and Indians continued until late in the nineteenth century.<sup>33</sup>

Until legislation (of questionable constitutional validity) barred the practice in 1871,<sup>34</sup> much of the national regulation of Indian affairs took place through the medium of executive treaties. In the treaty-making context, Congress considered an Indian tribe equivalent to a foreign nation. Such treaties bound, and continue to bind, the states through the Supremacy Clause.<sup>35</sup> By this mechanism, federal power over Indian tribes vastly increased. Tribes ceded not only territory, but often the right to govern their own affairs. Except where expressly repudiated by the federal government, these treaties generally remain in force. Although the parties who signed these treaties possessed greatly unequal bargaining power, the courts have never used this disparity to question their legal force. In *Fellows v. Blacksmith*,<sup>36</sup> for example, the Court held that a ratified Indian treaty "becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can behind an act of Congress." Nevertheless, courts — as a principle of construction — generally construe doubtful provisions of treaties and statutes in favor of the Indians.<sup>37</sup> Congress may abrogate these treaties,<sup>38</sup> subject in some circumstances to Fifth Amendment takings limitations.<sup>39</sup>

Nineteenth-century cases occasionally used national ownership of the land as a conceptual basis for federal control of Indian affairs. In *United States v. Kagama*,<sup>40</sup> the Court found authority for federal control of criminal acts within Indian Country based on "the own-

32. SAMUEL L. TYLER, A HISTORY OF INDIAN POLICY 38, 53 (1973). See, e.g., *United States v. Crook*, 25 F. Cas. 695, 700 (D. Neb. 1879) (No. 14,891) (Justifying the confinement of Indians on reservations because "[e]very nation exercises the right to arrest and detain an enemy alien during the existence of a war, and all subjects or citizens of the hostile nations are subject to be dealt with under this rule.").

33. The last significant conflict was the battle of Wounded Knee in December 1889. ROBERT M. UTLEY & WILCOMB E. WASHBURN, INDIAN WARS 299-300, 340-41 (1977).

34. Indian Appropriation Act of 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1988)).

35. U.S. CONST. art. VI, cl. 2; see *United States v. 43 Gallons of Whiskey*, 93 U.S. 138, 197-98 (1876).

36. 60 U.S. (19 How.) 366, 372 (1856).

37. *Choctaw Nation v. United States*, 119 U.S. 1, 27-28 (1886); *Choate v. Trapp*, 224 U.S. 665, 667 (1912).

38. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903).

39. See, e.g., *United States v. Sioux Nation*, 448 U.S. 371, 415 & n.29 (1979).

40. 118 U.S. 375 (1886).

ership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else.”<sup>41</sup> Forty years earlier, in *United States v. Rogers*,<sup>42</sup> Chief Justice Roger Taney held that the Cherokee lands had “been assigned to them by the United States as a place of domicile for the tribe and they hold with the assent of the United States, and under their authority.”<sup>43</sup> This authority was “too firmly and clearly established to admit of dispute.”<sup>44</sup>

The *Rogers* and *Kagama* reasoning is — at best — only partially consistent with earlier statements made by the Court in the Cherokee cases. Probably the most famous judicial explanation of the status of the tribes appeared in *Cherokee Nation v. Georgia*:

Though the Indians are acknowledged to have an unquestionable, and heretofore, unquestioned right to lands they occupy, until the right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more accurately, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.<sup>45</sup>

In the same vein, the Chief Justice argued in *Worcester v. Georgia* that European titles in the New World conferred no more than an exclusive right to purchase land from the native inhabitants.<sup>46</sup> Perhaps because of its faintly circular quality — how can the national government gain title to the land without first having established sovereignty over its original inhabitants? — the territorial-ownership theory of federal power is rarely mentioned today.

Marshall’s “guardian-ward” reasoning, however, remains a central justification for federal control. Justice William Brennan, in dicta in *Baker v. Carr*,<sup>47</sup> cited Marshall’s “state of pupillage” as the basis for the unique status of Indian tribes in our governmental system. More

41. *Id.* at 380.

42. 45 U.S. (4 How.) 567 (1846).

43. *Id.* at 572.

44. *Id.*

45. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

46. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543-45 (1832).

47. 369 U.S. 186, 215-16 (1961).



recently, in *Morton v. Mancari*,<sup>48</sup> the Court held that there is "a plenary power of congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes."<sup>49</sup> This line of reasoning — at least implicitly — is a limitation as well as a source of federal power. Presumably, actions designed to *harm* tribal Indians could not be justified as taken pursuant to a power to protect a dependant people.<sup>50</sup>

The aggregate of these powers has been described as "the creation of a new power, a power to regulate Indians."<sup>51</sup> As in *Morton*, this authority is often defined by courts and commentators as "plenary." While this authority finds its constitutional origin in the Indian Commerce Clause, the courts have effectively supplemented this provision from both within and without the text of the Constitution. This supplementation partly explains why, while the reach of federal power under the interstate commerce clause has expanded substantially over the last two hundred years,<sup>52</sup> the reach of the Indian Commerce Clause expanded far more dramatically, with the growth occurring in an earlier time period. At least one limitation to this authority exists, however. The power can only be applied to "Indians."<sup>53</sup>

What powers over Indian affairs remain in the hands of the Indian tribes and the states? An Indian tribe, at least in theory, retains all sovereign powers which Congress has not chosen to take away from it. A tribes' powers are thus not delegated by Congress, but arise from an inherent sovereignty, (analogous in some ways to that of a state), that predates the existence of the federal union.<sup>54</sup> Justice John Marshall expressed this view,<sup>55</sup> and the Court affirmed it in later

48. 417 U.S. 535 (1974).

49. *Id.* at 551. The ICWA relies partly on this "guardian-ward" reasoning to justify the Congressional regulation. See 25 U.S.C. § 1901 (1988) (congressional findings).

50. In fact, *Morton* does require that "the special treatment . . . be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton*, 417 U.S. at 555; see also *United States v. Big Crow*, 523 F.2d 955, 959-60 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976) (holding that a federal law mandating a higher penalty for assault for a reservation Indian than would apply to non-Indians on the reservation violates equal protection).

51. William Gorham Rice, Jr., *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEG. 78, 81 (1934).

52. See, e.g., Letter from Gerald Gunther to the Department of Justice (June 5, 1963), reprinted in GERALD GUNTHER, *CONSTITUTIONAL LAW* 163 (1985) (discussing the commerce power and the Civil Rights Act of 1964).

53. *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

54. See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1942 ed.).

55. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) ("The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.").

cases.<sup>56</sup> In *Worcester*, the Court envisioned the Cherokees as holding their "right of self-government under the guarantee and protection" of the national government.<sup>57</sup> As a consequence of tribal courts' independent sovereignty, the Bill of Rights or other federal restrictions generally do not limit tribal courts,<sup>58</sup> although — at least on some issues — court decisions have gone the other way.<sup>59</sup> At the same time, the external sovereignty of the tribes has been severely constrained. State courts have exercised jurisdiction over disputes between non-Indians occurring on a reservation, and have heard suits by reservation Indians against outsiders.<sup>60</sup>

Tribal authority is often enhanced by congressional delegations of specific powers, in a sense restorations of powers that had previously existed, in accord with federal policies designed to promote reservation self-government. The ICWA is one example. Thus, for any exercise of tribal jurisdiction, it may be appropriate to ask if the jurisdiction is based on the tribes' inherent sovereignty or on a federal delegation of specific authority.

While the Cherokee cases virtually precluded state control over Indian affairs, absent a delegation of authority from Congress, more recent events have changed the situation in some respects. On one hand, during the 1950s Congress transferred a good deal of its control over reservations to the state governments. Public Law 280<sup>61</sup> accomplished this transfer by extending the civilized criminal jurisdiction of several states over reservations within their boundaries. Moreover, in *Williams v. Lee*,<sup>62</sup> the Supreme Court reformulated the *Worcester* rule which had excluded states from control of Indian affairs. State actions are now invalid, "absent governing Acts of Congress," only if "the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."<sup>63</sup> This "infringement test" has apparently yet to result in any significant change in the

56. See, e.g., *Ex parte Crow Dog*, 109 U.S. 556, 568-69 (1883); *United States v. Quiver*, 241 U.S. 602, 605-606 (1915). But see *Williams v. Lee*, 358 U.S. 217, 220 (1958).

57. *Worcester*, 31 U.S. (6 Pet.) at 561.

58. *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (Fifth Amendment does not apply.).

59. See *In re Sah Quah*, 31 F. 327 (D. Alaska Cir. 1886) (tribes may not hold slaves).

60. *Williams v. Lee*, 358 U.S. 217, 219-20 (1958).

61. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (including California, Minnesota, Nebraska, Oregon, and Wisconsin) (current version at 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-1326 (1988), 28 U.S.C. § 1360 (1988)). See generally Russel L. Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 *Hast. L.J.* 1287, 1301 n.87 (1980).

62. 358 U.S. 217 (1958).

63. *Id.* at 220.

state-reservation relationship.<sup>64</sup> In any case, these judicial rules governing state-Indian relations are generally not relevant where Congress has expressly spoken — as is the case with the ICWA.

### B. Federal Indian Policy

The ICWA represents an Indian policy at odds with itself. For most of the last two hundred years two competing conceptions have struggled for primacy. One view holds that Indians should be encouraged to assimilate into the dominant Western, "white" society. The other view aims to encourage the preservation of a distinct Indian culture, and to preserve the tribes and their reservations as separate, self-governing institutions. While one or the other of these views has tended to predominate during alternating time periods, often the two themes hopelessly intertwine and neither has ever completely crowded out the other.<sup>65</sup> The ICWA, primarily a product of the "separatist" view, was designed to enhance Indian self-determination and autonomy.<sup>66</sup>

At the outset of the new republic, Congress intended the goal of Indian policy primarily to be to assimilate and "civilize" the native population. Thomas Jefferson perhaps became the most prominent figure in formulating early federal Indian policy, from 1789 until the onset of removal in the late 1820s.<sup>67</sup> Jefferson's idea, by no means a new one, was to convert the Indians into agriculturalists and provide them with the rudiments of a Western education.<sup>68</sup> Accordingly, an 1819 statute provided "for introducing among [the Indians] the habits and arts of civilization, . . . to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic. . . ."<sup>69</sup> Teaching the Indians agricultural techniques had the fortunate and deliberate consequence of

64. See *TRIBE*, *supra* note 28, at 1469; Robert Ericson & D. Rebecca Snow, Comment, *The Battle for Indian Self-Determination*, 58 CAL. L. REV. 445, 472-81 (1970) [hereinafter *Indian Self-Determination*].

65. See *TYLER*, *supra* note 32, *passim*; *Indian Self-Determination*, *supra* note 64, at 446.

66. See 25 U.S.C. § 1901 (1988) (congressional findings); *id.* § 1902 (congressional declaration of policy).

67. See BERNARD SHEEHAN, *SEEDS OF EXTINCTION* 3-12 (1973). Jefferson was known for the observations on Indian culture contained in chapter XI of his *NOTES ON THE STATE OF VIRGINIA*, published in 1787.

68. See, e.g., Letter from Thomas Jefferson to Brother Handsome Lake (Nov. 3, 1802), reprinted in MERRILL D. PETERSON, *THE PORTABLE THOMAS JEFFERSON* 305-07 (1975); see also WILCOMB E. WASHBURN, *RED MAN'S LAND / WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* 61 (1971) (quoting statements by President Jefferson urging assimilation on a visiting Indian delegation).

69. Act of March 3, 1879, ch. 85, 3 Stat. 516. Chief Justice Marshall relied on this act as evidence of the intent of Congress to preempt state control of Indian tribes. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832); see also *TYLER*, *supra* note 32, at 45.

reducing the Indians' need for land, thus freeing up territory for white settlement.<sup>70</sup> The reduction of Indian land holdings, along with the protection of frontier settlements from Indian raids, were consistent and primary policy objectives until the early twentieth century.

The emphasis of Indian policy shifted from assimilation to separation with the onset of removal in the late 1820s.<sup>71</sup> This effort to transplant Indian tribes from the populous East to a newly created Indian Country west of the Mississippi was closely associated with the presidency of Andrew Jackson,<sup>72</sup> although the idea had originally been considered by President Jefferson, and Presidents James Monroe and John Quincy Adams at least nominally supported it.<sup>73</sup> Ironically, the very success of the earlier efforts at assimilation had created a more sedentary society and thus increased Indian attachment to their lands making the policy more difficult to implement.<sup>74</sup> As the westward movement of the frontier soon engulfed these areas, removal to Indian Country did not prove to be a permanent and viable solution. A new policy of separation took place during the 1850s, 1860s, and 1870s, with the concentration of Indians into reservations within the former Indian Country.<sup>75</sup>

The General Allotment Act of 1887 (GAA)<sup>76</sup> marked a swing back to an purely assimilationist framework. The idea was to divide the reservations into parcels of 80 and 160 acres, and turn them over to individual Indians for cultivation. The federal government would hold the allotments in trust for the individual Indian for twenty-five years, after which time the Indians would receive full title.<sup>77</sup> Indians

70. See Letter from Thomas Jefferson to Brother Handsome Lake, *supra* note 68, at 306-307. The revocation following the Revolutionary War of the British "Proclamation of 1763," which had confined the colonialists east of the Appalachians, had unleashed a tide of encroachment on Indian lands. At least one historian has listed the Proclamation of 1763 — in a sense a separatist policy — as an underlying cause of the American Revolution. JOHN C. MILLER, *ORIGINS OF THE AMERICAN REVOLUTION* 75-77 (1959).

71. See *supra* note 28 and accompanying text.

72. Elected in 1828, and reelected in 1832.

73. Jefferson had proposed a constitutional amendment to authorize Indian removal as early as 1803. TYLER, *supra* note 32, at 54. Monroe and Adams supported removal, on the condition that removal be voluntary. Burke, *supra* note 24, at 504, 506. See also SAMUEL E. MORRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 445-46 (1965). The brutality of removal as actually carried out against the Cherokees is well described in TRIIBE, *supra* note 28, at 1467-68.

74. Burke, *supra* note 24, at 503; UTLEY & WASHBURN, *supra* note 33, at 139.

75. This concentration policy could quite legitimately be viewed as simply a step in an overall policy of assimilation, as it was easier to "civilize" the Indians once they were confined on reservations. See UTLEY & WASHBURN, *supra* note 33, at 193.

76. Dawes Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-416j (1988)).

77. *Id.* §§ 1, 3 (congressional amendments and executive orders later extended this time period); see 25 U.S.C. § 348 (1988) and references following; 25 U.S.C. § 462 (1988); TYLER, *supra* note 32, at 96.

who completed this process became citizens. The GAA provided that these Indians:

[S]hall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian . . . who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights privileges, and immunities of such citizens. . . .<sup>78</sup>

Undoubtedly, many of the proponents of allotment were sincerely interested in the well-being of the Indians.<sup>79</sup> At the same time, it is significant that the Allotment Act contained a provision that allowed the Secretary of the Interior to purchase and sell off "surplus" tribal lands.<sup>80</sup> Indian landholdings declined substantially during the allotment period.<sup>81</sup>

The end of the allotment era and a shift back to a separatist policy came with the "Indian New Deal" under the Roosevelt administration. The new administration ended allotment, increased tribal landholdings, strengthened tribal institutions, and deliberately fostered Indian culture and languages.<sup>82</sup> Designed to shift authority towards self-governing tribes organized under new constitutions, the Wheeler-Howard Indian Reorganization Act<sup>83</sup> became the legislative center piece. The economic viability and independence of the reservations were increased.

Just two decades later, however, the policy reversed and the goal became "termination" of federal supervision of the tribes as inde-

78. *Id.* § 6. See *United States v. Nice*, 241 U.S. 591 (1916) for the judicial gloss on this section. See also *infra* text accompanying notes 141-57.

79. But consider the following statement by a contemporary allotment proponent: "The Indians should be treated in just the way that we treat the white settlers. Give each his little claim; if, as would generally happen, he declined this, why, then let him share the fate of thousands of white hunters and trappers who have lived on the game that the settlement of the country has exterminated, and let him, like these whites, perish from the face of the earth. . . ." THEODORE ROOSEVELT, *HUNTING TRIPS OF A RANCHMAN* 19 (1885). The future President was later known as a reformer of the Indian Service. EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* 454-55 & n.124 (1979).

80. Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388 (the Dawes Act).

81. WASHBURN, *supra* note 68, at 75 (a reduction from 138 million acres in 1887 to 48 million acres in 1934).

82. See generally TYLER, *supra* note 32, at 125-50.

83. Act of June 18, 1934, ch. 576, §§ 1-19, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1988)).

pendent political entities.<sup>84</sup> The Eisenhower administration's policies were embodied in House Concurrent Resolution 108:

[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship.<sup>85</sup>

The Resolution included a list of tribes recommended for termination. In accord with Resolution 108, Congress passed Public Law 280,<sup>86</sup> extending the jurisdiction of selected states over Indian Country. Some tribes actually were terminated.<sup>87</sup> This was assimilation *par excellence*.

But by the late 1960s the policy again shifted — with the beginning of the present period. The new emphasis was and remains on tribal self-determination. The Indian Civil Rights Act of 1968<sup>88</sup> revised Public Law 280, making tribal consent a necessary element for the assumption of state jurisdiction<sup>89</sup> and expressly recognizing tribal powers of self-government.<sup>90</sup> Other elements of the 1968 legislation, including the creation of a statutory bill of rights applicable to tribal governments,<sup>91</sup> and allowing review by a federal court on a petition for a writ of habeas corpus,<sup>92</sup> are neither clearly separatist nor clearly assimilationist. The provisions do, however, manifest a commitment to the continued existence of the reservation system. Both Presidents

84. The underlying trend back to an assimilationist policy dates back to the early 1940s. See, e.g., Carl Carmer, Editorial, *We Need a Wise Policy of Assimilation*, 4 AM. INDIAN 2 (1948); William E. Warne, Editorial, *The Public Share in Indian Assimilation*, 4 *id.* at 3.

85. H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. 132 (1953).

86. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-1326 (1988), 28 U.S.C. § 1360 (1988)). See also *supra* note 61.

87. *Indian Self-Determination*, *supra* note 64, at 460 n.124 (proceedings commenced against the Menominee, Klamath, Paiute et al.).

88. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-1341 (1988)).

89. *Id.* §§ 401-406, 82 Stat. at 78-80.

90. *Id.* § 201, 82 Stat. at 77.

91. *Id.* § 202, 82 Stat. at 77-78 (codified at 25 U.S.C. § 1302 (1988)). The bill of rights contains, *inter alia*, an equal protection provision: "No Indian tribe in exercising powers of self-government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. . . ." *Id.* § 202(8), 82 Stat. at 77.

92. *Id.* § 203, 82 Stat. at 78.

Johnson and Nixon publicly endorsed tribal self-determination,<sup>93</sup> and no substantial change in this essentially separatist policy has occurred through the Bush administration. Nevertheless, there have been tensions between some relatively conservative executive branch appointees, who may lean towards an assimilationist viewpoint, and the congressional committees, which seem more sympathetic towards tribal autonomy.<sup>94</sup>

### C. *The Indian Child Separation Crisis*

Testimony before congressional committees in 1974, 1977, and 1978 documented the existence of a crisis in the Indian family and in its relationship with the state courts.<sup>95</sup> The problem is two-fold. On one hand, judicial decisions to remove children from their families because of parental abuse or neglect occur at a disproportionately high rate among Indian families. At the same time, most adoptive and foster care placements of these children have been with non-Indian families — thus, effectively removing the children from Indian society.

The statistics are impressive. In 1976 a task force of the American Indian Policy Review Commission found that 25% to 35% of all Indian children were being raised by non-Indians in homes and institutions.<sup>96</sup> The 1977 Hearings before the Senate Select Committee on Indian Affairs confirmed a figure of at least 25%.<sup>97</sup> These two numbers do, however, include children enrolled in off-reservation boarding schools — schools which are properly a separate subject unto themselves, although many of the issues overlap with those found in child custody and adoption. In particular, courts often place children in boarding schools as a means of providing substitute care

93. See President Johnson's Special Message to Congress (Mar. 6, 1968), in DOCUMENTS OF UNITED STATES POLICY 248 (Francis P. Prucha ed., 1975) [hereinafter PRUCHA]; President Nixon's Special Message on Indian Affairs (July 8, 1970), reprinted in PRUCHA, *supra*, at 256.

94. See, e.g., *infra* note 237 (describing a disagreement between former Secretary of the Interior Donald Hodel and the Senate Select Committee on Indian Affairs); *infra* note 110 (describing a disagreement between Assistant Secretary for Indian Affairs Ross Swimmer and the same Senate committee in their appraisal of conditions on reservations).

95. *Indian Child Welfare Act of 1978: Hearings Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. (1978); *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. (1977) [hereinafter 1977 Hearing]; *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. (1974).

96. AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 79 (Comm. Print 1976) [hereinafter 1976 REPORT].

97. 1977 Hearing, *supra* note 95, at 1; Barsh, *supra* note 61, at 1287, 1290 n.15.

away from the reservations.<sup>98</sup> Indian children were in the early 1970s roughly six times more likely to be placed in foster care, and nearly four times more likely to be adopted, than were non-Indian children.<sup>99</sup> When adoptions were ordered, between 75% and 93% of the children were placed with non-Indian families.<sup>100</sup>

Various commentators have attempted to explain this crisis and to document its relation to federal Indian policies. The Task Force of the American Indian Policy Review Commission had this to say:

One of the most pervasive components of the various assimilation or termination phases of American policy has been the notion that the way to destroy Indian tribal integrity and culture, usually justified as “civilizing Indians,” is to remove Indian children from their homes and tribal settings. This effort began in earnest in the 1880’s when Indian children were removed from their homes and sent to distant boarding schools.<sup>101</sup>

The Commission found the current problem with child separations to result from an outgrowth of the continuation of past assimilationist policies.<sup>102</sup> Courts force children — in effect — to assimilate into non-Indian society via removal and placement proceedings in state court.<sup>103</sup> This need not be done intentionally. In the Commission’s theory, ignorance of Indian lifestyles on the part of non-Indian social workers and state judges leads to culturally inappropriate child placement decisions.<sup>104</sup> Bias would have the same effect.<sup>105</sup>

98. 1976 REPORT, *supra* note 96, at 179.

99. These numbers are calculated from data compiled in Barsh, *supra* note 61, at 1288 n.14. This information in turn was collected by the Association of American Indian Affairs and reported in the 1977 Hearing, *supra* note 95, at 538, 603. The full state-by-state report of the Association is available in the 1976 REPORT, *supra* note 96, at 177-242.

100. 1976 REPORT, *supra* note 96, at 182, 189, 211, 220. Only four states reported this figure: Alaska (93%); California (92%); Montana (87%); and North Dakota (75%).

101. 1976 REPORT, *supra* note 96, at 78-79.

102. *Id.* at 79-80. The essays collected in STEVEN UNGER, *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* (1977) provide compelling support for this view.

103. See Abourezk, *The Role of the Government: A Congressional View*, in UNGER, *supra* note 102, at 12 (“Up to now, however, public and private welfare agencies seem to have operated on the premise that most Indian children would be better off growing up non-Indian.”).

104. *Id.* at 80.

105. See generally Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 888-89 (1975) (discussing the possibility of “class or cultural bias” in removal decisions).



Critics frequently cite two factors as playing a role in mistaken placement decisions. First, courts lack an understanding of the Indian extended family,<sup>106</sup> and second, courts exaggerate the problem of Indian alcoholism.<sup>107</sup> For example, social workers might treat leaving a child with relatives outside the nuclear family as neglect, without considering the differing, though legitimate, practices of Indian families. Nevertheless, it is difficult to believe that these factors alone could account for the substantially higher rates of neglect determinations among Indian families. The Association on American Indian Affairs has suggested additional causes. These causes include: voluntary waivers obtained under varying forms of duress; the existence of financial incentives to secure children for adoption; termination proceedings in which parents do not know their rights and have no attorney; the use of family poverty as grounds for removal; the poor quality of state social workers; and the lack of funding for tribal family service programs.<sup>108</sup> When taken together these factors add up to a substantial problem.

At the same time, one should bear in mind that the general standard used in custody determinations is "the best interests of the child."<sup>109</sup> Such a subjective standard does open up the possibility for culturally biased decisions by a state court. But one should not use this fact to deny the existence of genuine problems in Indian societies. Reservation populations suffer from poverty, alcoholism, family disintegration, unusually high birth rates, and "cultural disorientation."<sup>110</sup> Urban Indians suffer from many of the same problems that other

106. See William Byler, *The Destruction of American Indian Families*, in UNGER, *supra* note 102, at 3 (much of this article is reproduced in the background statement of H.R. REP. No. 1386, *supra* note 17, at 10-12).

107. Compare Joseph Westermeyer, "The Drunken Indian": Myths and Realities, in UNGER, *supra* note 102, at 22 with the materials cited *infra* note 110.

108. Byler, *supra* note 106, at 4-7; see also Barsh, *supra* note 61, at 1292-1303.

109. See, e.g., Areen, *supra* note 105, at 900 n.74 (describing the historical development of the best interests standard); *In re Robert T v. Devon T*, 246 Cal. Rptr. 168, 174 (1988) (an application of the "best interests" standard under the Act).

110. See Byler, *supra* note 106, at 6-7. The head of the Bureau of Indian Affairs has recently stated that "we see cases on a regular basis of child abuse" and that "the family structure on [the] reservation . . . is now in danger of being lost totally because of alcoholism and — [cut-off by the Chairman]." *Statement of Ross Swimmer, Assistant Secretary for Indian Affairs, Department of the Interior*, in 1988 Hearing, *supra* note 10, at 50-51. Assistant Secretary Swimmer's testimony is starkly at odds with much of the recent academic literature in its portrayal of conditions on reservations. But see WASHBURN, *supra* note 68, at 234-37 (describing alcohol problems on reservations); Theodore D. Graves, *Acculturation, Access, and Alcohol in a Tri-Ethnic Community*, 69 AM. ANTHROPOLOGIST 306-21 (1967) (same). See generally U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION vol. 1, ch. D, pt. 1, tbl. 2 (1980) (Detailed Population Characteristics, United States Summary) (Subject Report, American Indians) (raw economic and social statistics) [hereinafter 1980 CENSUS].

poor inner-city minorities face.<sup>111</sup> Admittedly, removing children in many cases will likely accelerate the breakup of Indian families, and thus feed back into the problems faced by reservation societies. Poverty alone should not serve as grounds for removal.<sup>112</sup> Nevertheless, some proportion of these removals could reflect the best interests of the individual child, even if they lie contrary to native American interests in preserving their own reservations. The same may be true of decisions to place removed children with more stable, wealthy, non-Indian families, at least in situations where the court cannot find suitable Indian homes.<sup>113</sup> To the extent that the Indian child welfare crisis arises from reservation social problems rather than mere procedural shortcomings, state or federal legislators will have great difficulty finding solutions.

In any event, the ICWA reflects a congressional judgment that dismantling a society by forcibly removing its children is unacceptable. The Act deals with the problem, whenever possible, simply by transferring the cases to tribal court. Such a shift in responsibility should prove helpful, and accords with governing assumptions that tribal Indians can better run their own affairs through autonomous political reservations. At the same time, a tension exists between the two separate goals of the ICWA; "to protect the best interests of Indian children," and "to promote the stability and security of Indian tribes."<sup>114</sup> This tension and the problems that can result from it become more stark in the consideration of the proposed amendments, Senate Bill 1976.

## II. *Equal Protection and the ICWA*

### A. *Due Process and Equal Protection*

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United

111. See David Null, *In Re Junious M.: The California Application of the Indian Child Welfare Act*, 8 J. Juv. L. 75, 85-86 (1984) (arguing that the Act should not be applied to urban Indians).

112. See Areen, *supra* note 105, at 910-11, 926, 930-31 (arguing that the existence of family poverty should not suffice for a finding of parental neglect).

113. A child, however, may generally be better off when placed with a family that matches that child's ethnic and cultural origin. This is the official position of the National Committee For Adoption. See *Testimony of the National Committee for Adoption*, William L. Pierce, Ph.D., 1988 Hearing, *supra* note 10, at 184. The subject of same race versus mixed race adoptions is an unsettled field.

114. 25 U.S.C. § 1902 (1988) (congressional declaration of policy). Compare *id.* with S. 1976, § 3. See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 n.3 (1989) (quoting statements by the 1978 Act's congressional sponsors); *id.* at 49 ("Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of

States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>115</sup>

Until quite recently, very few cases explicitly addressed the question of equal protection or due process limitations on the power of the federal government to pass laws singling out tribal or ethnic Indians for special treatment. The issue can be divided into two components: (1) who qualifies as an Indian so as to be subject to special congressional regulation of Indian affairs; and (2) what are the limits on what can be done to those Indians who qualify? The early cases occasionally raise these issues in other contexts, without expressly mentioning equal protection. Moreover, only a single Supreme Court case has overturned an act of Congress regulating Indian affairs on anything resembling equal protection grounds, and the Court overruled that case just eleven years later.<sup>116</sup> Nevertheless, it is possible to derive certain rules from the existing cases.

The texts of the Fifth and Fourteenth Amendments do not in themselves reveal much. Section two of the Fourteenth Amendment provides that congressional representatives shall be apportioned by population — “excluding Indians not taxed.” From this one might at least infer that Congress did not intend the amendment to eliminate the special status of tribal Indians, or to destroy Congress’ power over Indian affairs (at least over those Indians “not taxed”). Beyond that, the language remains indeterminate.

The legislative history confirms that Congress did not intend that section one should directly alter the status of tribal Indians in American society.<sup>117</sup> Although the first section of the Civil Rights Act of 1866, the statutory precursor to the Fourteenth Amendment, originally qualified its definition of “citizen” with the “excluding Indians not taxed” phrase,<sup>118</sup> no such qualification appears in the crucial first

115. U.S. CONST. amend. XIV, § 1. The Fifth Amendment provides that “[N]o person” shall “be deprived of life, liberty, or property, without due process of law.” *Id.* amend. V. See also *supra* note 18 and accompanying text.

116. *In re Heff*, 197 U.S. 488 (1905), *overruled by* *United States v. Nice* 241 U.S. 591 (1916).

117. See generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 102-04 (1988).

118. Civil Rights Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (1988)). The 1870 reenactment of the 1866 Act substituted the phrase “within the jurisdiction of the United States” for the limiting language, including the “Indians not taxed” phrase, contained within the 1866 version. See *San Mateo County v. Southern Pacific R.R.*, 13 F. 145, 151 (D. Calif. Cir. 1882).

section of the Fourteenth Amendment itself. The Senate floor debates make clear that the Senate did not intend the omission to have substantive impact.<sup>119</sup>

Senator Lyman Trumbull, chairman of the Judiciary Committee and the primary author of the 1866 Civil Rights Act, had inserted the phrase into the Civil Rights Act (Senate Bill 61) to insure that citizenship would not be extended to encompass

the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws, with whom we make treaties, who have their own regulations, [and] whom we do not pretend to interfere with or punish for the commission of crimes one upon the other. . . .<sup>120</sup>

Senator James Doolittle concurred, believing that the distinction between Indians taxed and not taxed was "fundamental" and recognized "[f]rom time immemorial," embodying the difference between traditional and assimilated individuals.<sup>121</sup> All Senators speaking agreed that tribal Indians were not prepared for the rights and obligations of citizenship.

Four months later, during the Senate debates on the proposed constitutional amendment, Senator Trumbull changed his position. He no longer considered the "not taxed" language as a limitation on citizenship appropriate. He feared the phrase shaded of a property qualification, and believed that independent, tribal Indians were not subject to the jurisdiction of the United States in any case, and thus would not be embraced within the scope of the proposed section one (which used the phrase "subject to the jurisdiction thereof" as its qualifier on the definition of citizen).<sup>122</sup> Senator Doolittle, who believed that such Indians were in fact subject to federal jurisdiction, still wished to add the "Indians not taxed" language to emphasize that tribal Indians would not be covered. Although Doolittle's proposed amendment to insert the "Indians not taxed" language lost by a ten to thirty vote, those senators who voted against the limitation apparently did so in the belief that tribal Indians were already

119. In any event, it should be noted that the Equal Protection Clause is directed to "any person," not to "any citizen." Thus, it is not clear that the citizenship definition is directly relevant to the latter clause, even though they appear in the same section. See generally ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 40-41, 45-54 (1975) (arguing that the Fourteenth Amendment's definition of citizenship is largely irrelevant to other constitutional provisions).

120. CONG. GLOBE, 39th Cong., 1st Sess. 527 (1866) (Sen. Trumbull's remarks, Jan. 31, 1866).

121. *Id.* at 571 (Sen. Doolittle's remarks, Feb. 1, 1866); see also *id.* at 572 (Sen. Trumbull's remarks further defining "Indians not taxed").

122. *Id.* at 2892-94 (remarks on the floor of the Senate, May 30, 1866).

excluded by the jurisdictional language.<sup>123</sup> The Senate, in 1866, did not believe that the Fourteenth Amendment would directly alter the status of tribal Indians in the United States.

Thus, one must apparently distinguish tribal Indians from assimilated Indians in applying the Fourteenth Amendment's section one limitations. But first and perhaps more significantly, it remains to determine to what extent section one of the Fourteenth Amendment, either in its own right or by means of the Fifth Amendment Due Process Clause, acts as a limitation on the power of the federal government. Taken at face value, the Fourteenth Amendment only limits state regulation.

At least since the time of the Second World War Japanese-internment cases, however, the Supreme Court has consistently viewed equal protection restrictions on racial discrimination as incorporated within the Fifth Amendment Due Process Clause, and thus as limiting the federal government. This assumption underlies the discussion in *Hirabayashi v. United States*<sup>124</sup> and *Korematsu v. United States*,<sup>125</sup> which upheld the internment orders, and was brought out more explicitly in the *Korematsu* dissents.<sup>126</sup> A decade later, a unanimous Court in *Bolling v. Sharpe*<sup>127</sup> quoted with approval dicta from a late nineteenth-century case to the effect "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the states, against any citizen because of his race."<sup>128</sup> More recently, in 1981, a majority of the Court stated that "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."<sup>129</sup>

The only real dispute on the Court has been over the standard to be applied to Congress in cases involving preferential treatment of racial minorities. In *Metro Broadcasting, Inc. v. FCC*,<sup>130</sup> the Court's latest pronouncement on the issue, a five-justice majority accepted the promotion of broadcast diversity as a sufficient interest to justify a racial preference. The majority applied an intermediate standard

123. *Id.* at 2897.

124. 320 U.S. 81 (1943).

125. 323 U.S. 214 (1944).

126. See *id.* at 235 (Murphy, J., dissenting); *id.* at 246 (Jackson, J., dissenting).

127. 347 U.S. 497 (1954) (invalidating school desegregation in the District of Columbia).

128. *Id.* at 499 (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896)).

129. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1981) (5-4 decision) (opinion of the Court by O'Connor, J., joined by Brennan, White, Marshall, and Stevens, J.J.). No reasoning justifying this conclusion was offered, either in the opinion itself or in the cases cited therein.

130. 110 S. Ct. 2997 (1990).

of scrutiny,<sup>131</sup> but would only apply this deferential standard to "benign race-conscious measures mandated by congress."<sup>132</sup> The four dissenting justices<sup>133</sup> would have applied standard strict-scrutiny analysis. This dissent stated specifically that "[t]he Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications."<sup>134</sup>

Significantly, no current member of the Court has expressed any support for Judge Robert Bork's recent suggestion that equal protection limitations should be read to apply exclusively to the state governments, leaving the federal government unrestricted.<sup>135</sup> Under Bork's analysis, the Court would thus, presumably, overrule *Bolling*. John Hart Ely has advanced a similar opinion, although he would leave the Ninth Amendment as a possible out, serving as an alternative means of applying equal protection limitations or restrictions against the federal government.<sup>136</sup> While these suggestions may be consistent with an original-understanding-based interpretation of the Constitution, they lie contrary to existing precedent and the Court does not appear likely to adopt them. For the present, we may reasonably conclude that federal government discriminations outside the "benign" category will fall victim to the strict-scrutiny test: the regulation must be "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."<sup>137</sup> The basic fact of the application of the Equal Protection Clause to the federal government seems to be settled law.

As to the distinction between tribal and assimilated Indians, a 1879 district court decision, *United States v. Crook*,<sup>138</sup> held that an individual may sever his or her tribal ties, assimilate into the general society, and escape the reach of the federal Indian power. The context was a writ of habeas corpus filed by twenty-five Ponca Indians, seeking their release from confinement on a reservation. The court found that the Indian had a "God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence."<sup>139</sup> Although *Crook* is infrequently cited and higher courts

131. *Id.* at 3008-09 (holding that the governmental action must be substantially related to the achievement of an important governmental objective).

132. *Id.* at 3008-09 & n.12.

133. O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, J.J.

134. *Metro Broadcasting*, 110 S. Ct. at 3030 (O'Connor, J., dissenting).

135. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 83-84 (1990).

136. JOHN H. ELY, *DEMOCRACY AND DISTRUST* 32-33 (1980).

137. *Loving v. Virginia*, 388 U.S. 1, 11 (1966).

138. F. Cas. 695 (D. Neb. 1879) (No. 14,891).

139. *Id.* at 600.

have not directly followed it, the case represents a view in accord with that of leading Indian law commentators.<sup>140</sup> It may well be that similar cases have rarely arisen because the federal government has historically pursued policies favoring, rather than restricting, Indian assimilation.

The Courts' early twentieth-century decisions in *In re Heff*<sup>141</sup> and in *United States v. Nice*,<sup>142</sup> which overruled *Heff*, merit examination. *Heff*, an interpretation of section six of the Dawes Allotment Act of 1887,<sup>143</sup> held that Congress, by its own actions, had removed allottee Indians from the scope of the federal Indian power. While the Court conceded that "it is for Congress to determine when and how that relationship shall be abandoned,"<sup>144</sup> the Court would not allow Congress to revoke "the privileges of citizenship" once these privileges had been granted.<sup>145</sup> Thus, in *Heff*, the Court would not apply a 1897 federal law prohibiting the sale of alcohol to Indians to allotment recipients living off the reservation.

This result followed not because the 1897 Act directly violated the individual Indian's due process rights, but because, once the individual fell outside the scope of the federal Indian power, the federal government lost its constitutional authority to regulate his conduct. Such a regulation infringed upon the reserved police powers of the state.<sup>146</sup> The Court's reasoning, in assuming a federal government of limited and sharply defined powers, predated the more recent, expansive judicial interpretations of the powers granted the federal government.<sup>147</sup> Some critics of the ICWA have suggested that the law might be subject to a reserved power of the states or Tenth Amendment challenge.<sup>148</sup> However, in light of the reluctance of the Supreme Court since 1937 to enforce limits on the powers of the federal government vis-a-vis the states, one should not assume this to be the case. For example, the Court has now overruled even the relatively

140. See Cohen, *supra* note 1, at 13-14 (quoted at the outset of this Comment); TRIBE, *supra* note 28, at 1472. The existence of the case is acknowledged in H.R. REP. No. 1386, *supra* note 17, at 20.

141. 197 U.S. 488 (1905).

142. 241 U.S. 591 (1916).

143. See *supra* notes 76-80 and accompanying text.

144. *Heff*, 197 U.S. at 499.

145. *Id.* at 509.

146. *Id.* at 505-08.

147. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *United States v. Darby*, 312 U.S. 100 (1941).

148. For discussion, see H.R. REP. No. 1386, *supra* note 17, at 17-18; Linda Marousek, *The Indian Child Welfare Act of 1978: Provisions and Policy*, 25 S.D. L. REV. 98, at 106-108, 112 (1980).

limited restraint of *National League of Cities v. Usery*, which created a state autonomy barrier to congressional regulation.<sup>149</sup>

But presumably a court could, if it wished, reach the same conclusion by holding that subjecting an individual to racially discriminatory legislation would violate his Fifth Amendment rights. *Bolling* invites such a result.<sup>150</sup> This conclusion may involve the additional step of proving that the discrimination is adverse, rather than "benign."<sup>151</sup> Such a distinction potentially involves all the difficulties associated with the affirmative action cases, including what consideration a court should give to the rights of non-Indians affected by the law, and how harmful and beneficial legislation are to be distinguished. For example, how would a court determine if enforced abstinence from alcohol were harmful or beneficial to the individual?<sup>152</sup> While this area of the law remains uncertain, we can conclude that an adverse discrimination against a member of a racial minority group violates federal constitutional guarantees.<sup>153</sup>

The Court reached a different conclusion from *In re Heff* concerning the same legislation just eleven years later. In *United States v. Nice*,<sup>154</sup> the Court reversed itself and decided that Congress had in fact *not* intended to remove allotment recipients from the national guardianship, at least until the expiration of the twenty-five year trust period.<sup>155</sup> The Assistant Attorney General advocated this position before the Court.<sup>156</sup> Allottee Indians were once again forbidden to purchase liquor. Moreover, subsequent congressional amendment and executive orders have extended trust periods indefinitely.<sup>157</sup>

The Court had displayed a deferential attitude toward prevailing congressional policies two years earlier in *United States v. San-*

149. 426 U.S. 146 (1976), *overruled by Garcia*, 469 U.S. at 528.

150. See *supra* text accompanying notes 127-28.

151. See *Regents v. Bakke*, 438 U.S. 265 (1977). But see *Richmond v. Croson*, 488 U.S. 469 (1989).

152. By way of comparison, the Supreme Court of Canada has held invalid the conviction of a Canadian Indian for being intoxicated outside the boundaries of a reserve, on the grounds that such a conviction violated the equal protection provision of the Canadian Bill of Rights (Statutes of Canada, 8 & 9 Eliz. II, c. 44 (1960) (Eng.)). *The Queen v Drybones*, 1970 S.C.R. 282 (Can.); see also *A.G. Canada v. Laval*, 1974 S.C.R. 1349 (Can.) (upholding a provision of the Indian Act that stipulated that an Indian woman who married a non-Indian lost her Indian status, while an Indian man who married a non-Indian woman retained his Indian status); *A.G. Canada v. Canard*, [1976] 1 S.C.R. 170 (Can.) (upholding special provisions for the administration of estates of Indians living on reserves).

153. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

154. 241 U.S. 591 (1916).

155. *Id.* at 599-600.

156. *Id.* at 592.

157. See 25 U.S.C. § 348 (1988) (and references following); *id.* § 462.



*doval*.<sup>158</sup> In upholding a congressional ban on the sale of alcohol to the Pueblo Indians, the Court stated:

Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in questions whether, to what extent, and for what time they shall be recognized and dealt with as dependant tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the Courts.<sup>159</sup>

To all intents and purposes, the question of the eventual termination of the special relationship between tribal Indians and the federal government was placed within the political question doctrine, out of bounds for judicial decision.<sup>160</sup>

The Court set out the modern rule governing equal protection analysis of national legislation on Indian affairs in *Morton v. Mancari*.<sup>161</sup> Non-Indian employees of the Bureau of Indian Affairs (BIA) claimed that a hiring preference for Indians constituted invidious racial discrimination in violation of the Fifth Amendment. After finding that the preference, dating from the Indian Reorganization Act of 1934, had not been implicitly repealed by the 1972 Equal Employment Opportunity Act, the Court upheld the preference as a valid exercise of the federal Indian power. The Court found a clean solution in treating the classification as political, rather than racial:

[T]his preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial preference.' . . . The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-

158. 231 U.S. 28 (1913).

159. *Id.* at 46.

160. See also *Baker v. Carr*, 369 U.S. 186, 215-17 (1961) (quoting *Sandoval*, 231 U.S. at 46, with approval); *id.* at 282 (Frankfurter, J., dissenting) ("it is ordinarily for Congress, not the Court, to determine whether or not a particular Indian group retains the characteristics constitutionally requisite to confer the [congressional regulatory] power."). But note that both the majority and dissenting opinions in *Baker* refer to the eventual termination of congressional power over tribal groups, and thus should not necessarily be taken to mean that an individual's status as an Indian is always relegated to the political question doctrine. *United States v. Crook*, 25 F. Cas. 695 (D. Neb. 1879) (No. 14,891) remains good law. See *supra* text accompanying notes 138-40.

161. 417 U.S. 535 (1974). See generally Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 595-99 (1979) (discussing the *Morton* decision).

sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.<sup>162</sup>

And in fact, only members of federally recognized tribes were eligible for the benefit.<sup>163</sup> *Morton* was an easy case, at least from the viewpoint of Indian law, since tribal members were receiving an indisputable benefit. The result could even have been reached under ordinary *Regents v. Bakke* or *Metro Broadcasting Inc. v. FCC* reasoning.<sup>164</sup> If an Indian challenged a different law as an adverse discrimination, or if courts applied such a law to non-enrolled Indians, the Court could well reach a contrary result. The standard articulated in *Morton*, however, was close to a rational basis test:

As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.<sup>165</sup>

The Court's language and general attitude matches that seen earlier, in *Sandoval* and in *Nice*.

Two more recent decisions have answered some, though by no means all, of the questions left unaddressed by *Morton*.<sup>166</sup> Of particular interest is *Fisher v. District Court*,<sup>167</sup> an adoption case. *Fisher* set up the rules that governed state-tribal jurisdictional disputes over child-custody cases involving Indian children prior to the enactment

162. *Morton*, 417 U.S. at 553-54. The Court's statement that such legislation "single[s] out for special treatment a constituency of tribal Indians living on or near reservations" may suggest a *geographic* limitation on the federal Indian power. *Id.* at 552.

163. *Id.* at 553 n.24; cf. *United States v. John*, 437 U.S. 634, 650 (1978) (the Court finds unobjectionable a provision of the 1934 Indian Reorganization Act defining "Indians" to include "all other persons of one-half or more Indian blood"); 25 U.S.C. § 479 (1988).

164. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *Regents v. Bakke*, 438 U.S. 265, 304 n.42 (1977) (summarizing and distinguishing *Morton*); see also *Associated Gen. Contractors of America v. Pierce*, 694 F.2d 1162 (9th Cir. 1982).

165. *Id.* at 555. Two years later, *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1976), provided some evidence that the *Morton* standard was more than mere rational basis review. Although the Court upheld against an equal protection challenge a law denying one group of Delaware Indians benefits that were distributed to the remainder of the tribe, the Court stated that "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute" and examined the issues at length. *Id.* at 84. Justice Stevens dissented. *Id.* at 91; see *Johnson & Crystal*, *supra* note 161, at 600-02.

166. See generally *Johnson & Crystal*, *supra* note 161, at 599-607.

167. 424 U.S. 382 (1975) (per curiam).

of the ICWA. Applying the *Williams v. Lee* "infringement test" (discussed in part I),<sup>168</sup> the Court concluded that state jurisdiction over "a dispute arising on the reservation among reservation Indians" would interfere with the tribe's powers of self-government.<sup>169</sup>

*Fisher* expressly rejected the argument that denying the plaintiff access to state courts, under the particular facts of the case, constituted an impermissible racial discrimination. The Court justified this result by relying on the quasi-sovereign status of the tribe. As in *Morton*, this was a "political" rather than a racial classification. The opinion went further by stating:

[E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.<sup>170</sup>

Nevertheless, the facts in *Fisher* presented an easy case that did not raise the more complicated questions. All parties, including both parents and the child, were enrolled members of the tribe. Further, the child resided and lived on the reservation. The difficult issues of tribal control over non-members, of extraterritorial jurisdiction over children not domiciled on the reservation, and of tribal jurisdiction over parties lacking in minimum contacts with the tribal forum, were all lacking.

The Court handed down another significant decision in *United States v. Antelope*.<sup>171</sup> Two Coeur d'Alene Indians challenged their murder conviction under the federal Major Crimes Act on the grounds that they were subject to invidious racial discrimination, because, as Indians, they were tried under felony murder standards which would not have applied if they had been tried in the state courts. In affirming their convictions, Chief Justice Warren Burger repeatedly stressed that congressional legislation directed at tribal Indians did not racially discriminate.<sup>172</sup> The judicial deference of the *Mancari*

168. See *supra* notes 62-64 and accompanying text.

169. *Fisher*, 424 U.S. at 387.

170. *Id.* at 390-91.

171. 430 U.S. 641 (1977). Between 1974 and 1977 two federal courts of appeals found convictions of reservation Indians under more stringent federal criminal statutes to be violative of equal protection, since non-Indians would not have been subject to the provisions. *United States v. Big Crow*, 523 F.2d 1067 (8th Cir. 1975), *cert. denied* 424 U.S. 920 (1976); *United States v. Cleveland*, 503 F.2d 96 (9th Cir. 1974). These cases have been cast in doubt by *Antelope*. No federal court of appeals has found a federal regulation of Indian affairs to be in violation of equal protection since *Big Crow*.

172. *Antelope*, 430 U.S. at 644-46.

and *Fisher* decisions was not to be limited to legislation aimed at promoting Indian self-government, but would apply to all federal regulation of Indian affairs.<sup>173</sup>

A footnote in the *Antelope* opinion, however, may say more than the opinion itself.<sup>174</sup> Burger here drew attention to the fact that both defendants were “enrolled members of the Coeur d’Alene Tribe and were not emancipated from tribal relations,”<sup>175</sup> and that the crimes were committed within the confines of Indian Country. Chief Justice Burger then noted that “enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and ‘maintained tribal relations with the Indians thereon.’”<sup>176</sup> The Court declined to rule on the questions suggested in this footnote. Thus, the Court has yet to directly address the issues most relevant in the context of the ICWA. The Supreme Court has decided no significant Indian equal protection cases since *Antelope* in 1976.<sup>177</sup>

The only Supreme Court decision interpreting the ICWA, *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>178</sup> dealt solely with the definition of “domicile” in the context of a section 1911(a) exclusive jurisdiction proceeding. Significantly, three judges dissented from what would have seemed a relatively straightforward reading of the statute’s intent. The majority held that Indian parents could not escape tribal jurisdiction simply by leaving the reservation just prior to the birth of twins. Justice Steven’s dissenting opinion stressed the rights of the individual Indian parents, as against the interests of the tribe.<sup>179</sup>

Very few published opinions by any court deal with the constitutional issues which the ICWA potentially raises. In *In re Guardianship*

173. *Id.* at 646.

174. *Id.* at 646 n.7.

175. *Id.*

176. *Id.* (citations omitted). The two decisions cited by the Court were examined at length by the Department of Justice in its Feb. 9, 1978 letter to the House committee. See H.R. REP. NO. 1386, *supra* note 17, at 37-38. Only one case, *Ex parte Pero*, 99 F.2d 28 (7th Cir. 1938), was believed to be significant. That case held that a Indian (not enrolled as a tribal member) could not be convicted of an on-reservation murder in state court, but only in federal court. *Pero*, 99 F.2d at 34-35. The Department believed this to be distinguishable from the adoption situations.

177. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977). Both cases mention equal protection but do not alter the standards of the *Morton* and *Fisher* decisions.

178. 490 U.S. 30 (1989).

179. *Id.* at 55 (Stevens, J., dissenting) (“To preclude parents domiciled on a reservation from deliberately invoking the adoption procedures of state court . . . distorts the delicate balance between individual rights and group rights recognized by the ICWA.”).

of *D.L.L. & C.L.L.*,<sup>180</sup> the Supreme Court of South Dakota held that the children of an Indian family residing on a reservation, where each family member was enrolled in the tribe, were not denied due process or equal protection by exclusive tribal jurisdiction under section 1911(a). In *In re Appeal in Pima County Juvenile Action*,<sup>181</sup> the Court of Appeals of Arizona likewise held that a child domiciled on a reservation did not have his equal protection rights violated by denying him access to state courts under the provisions of section 1911(a). And in *Application of Angus*,<sup>182</sup> the Court of Appeals of Oregon held that the application of the provisions of the ICWA governing parental consent to adoptive care placements<sup>183</sup> did not violate the Fifth Amendment where both parents were enrolled members. No published opinion has dealt with the constitutional issues in depth or in difficult fact situations.

What rules can we derive from these cases? First, an ethnic Indian who is not an enrolled member of a tribe and does not live on or near a reservation will not be subject to federal regulation of Indian affairs. Such an individual should succeed in a due process or an equal protection challenge if the statute even arguably harms that individual. Second, an enrolled member living on or near a reservation will be subject to special regulation. This individual will not have an equal protection remedy even if the statute appears to have a slightly harmful effect: the courts will defer to the judgment of Congress in the exercise of its federal guardianship responsibilities. As for situations in between, however, the recent cases shed so little light that we can only suggest legal and policy rationales for where the line should be drawn.

## *B. The Jurisdictional Provisions of the ICWA*

### *1. 25 U.S.C. § 1911(a) Exclusive Jurisdiction*

The tribe has exclusive jurisdiction "over any child custody proceeding involving an Indian child who resides or is domiciled within

180. 291 N.W.2d 278, 282 (S.D. 1980) (relying on *Fisher v. District Court*, 424 U.S. 535 (1974)).

181. 635 P.2d 187, 193 (Ariz. App. 1981), *cert. denied sub nom. Catholic Social Servs. v. P.C.*, 455 U.S. 1007 (1982) ("The denial of access to state courts is based upon the political status of the parent and child and the quasi-sovereign nature of the tribe. This is a discriminatory classification which is not prohibited by the United States Constitution.") (citing *Fisher*).

182. 655 P.2d 208, 213 (Or. App. 1982), *cert. denied sub nom. Woodruff v. Angus*, 464 U.S. 830 (relying on *Morton v. Mancari*, 417 U.S. 535 (1974)).

183. 25 U.S.C. § 1913 (1988).

the reservation of such tribe.”<sup>184</sup> The statute defines “Indian child” as an unmarried person under eighteen who is “either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”<sup>185</sup>

Section 1911(a) can be readily described as an ordinary “political” jurisdictional boundary, thus insulating the section from any equal protection challenge. It differs little from the fact situation expressly approved in *Fisher v. District Court*,<sup>186</sup> and does not represent a significant change from the law as it existed before the 1978 act passed — at least regarding states already using a domicile standard.<sup>187</sup> For example, in *Wisconsin Potowatomies v. Houston*,<sup>188</sup> a federal district court held that Michigan could not exert jurisdiction over three orphaned children, with an Indian father and non-Indian mother, based only on presence when the children were domiciled on the reservation.<sup>189</sup> The court reasoned: “If tribal sovereignty is to have any meaning at all in this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity.”<sup>190</sup> Citing past cases, the court held that the domicile of the children followed that of the parent with whom the children lived, and that the domicile of adults required two elements: intent and physical presence.<sup>191</sup>

On the other hand, prior to 1978 two states, Arizona and Montana, used mere presence as a basis for asserting jurisdiction over Indian children.<sup>192</sup> The decisions reaching this conclusion, *In re Cantrell*<sup>193</sup>

184. *Id.* § 1911(a); see also *id.* § 1903(1) (“child custody proceeding” includes actions concerning foster care placement, termination of parental rights, preadoptive placements, and adoptive placements).

The “Baby Keetso” case, which received considerable media attention in April 1988, was a section 1911(a) proceeding. A California superior court (Santa Clara County; Nichols, Judge) transferred jurisdiction to a Navajo tribal court after finding that the child was legally domiciled on the reservation. See, e.g., LOS ANGELES TIMES, May 15, 1988, at 3, col. 1; TIME, May 2, 1988, at 64; Statement of Violet Lui, Attorney, the Navajo Nation (May 11, 1988), in 1988 Hearing, *supra* note 10, at 93.

185. 25 U.S.C. § 1903(4) (1988).

186. 424 U.S. 382 (1976).

187. For an overview of the jurisdictional law prior to 1978, see Mack T. Jones, *Indian Child Welfare: A Jurisdictional Approach*, 21 ARIZ. L. REV. 1123, 1129-35 (1979). See also *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 57-59 (1989) (Stevens, J., dissenting).

188. 393 F. Supp. 719 (W.D. Mich. 1973); see also *In re Greybull*, 543 P.2d 1079, 1080-81 (Or. App. 1975) (endorsing a domicile standard).

189. The children were enrolled members of the reservation.

190. *Wisconsin Potowatomies*, 393 F. Supp. at 730.

191. *Id.* at 732. See generally 25 AM. JUR. 2D *Domicile* § 1 (1966) (Definitions) and cases cited therein.

192. Jones, *supra* note 187, at 1129.

193. 495 P.2d 179 (Mont. 1972).

and *In re Duryea*,<sup>194</sup> have now been superseded by the enactment of the ICWA. The exclusive jurisdiction portion of the ICWA adopts the *Wisconsin Potowatomies* rule and makes it mandatory on all states.<sup>195</sup>

The *Fisher* decision involved a child domiciled on a reservation where both the child and its parents were enrolled members. But under the exclusive jurisdiction provision of the ICWA, either the child or one of its parents might not be enrolled as a member. Moreover, it is quite reasonable to expect that one of the parents might not even be an Indian. A mixed blood child is still likely to be eligible for membership under the provisions of a tribal constitution.<sup>196</sup> Nevertheless, domicile remains a reasonable basis for jurisdiction, and is analogous to the standard that would govern in a conventional interstate custody dispute.<sup>197</sup>

The child's parents, presumably, could still end tribal jurisdiction simply by resigning their membership, and thus placing their child outside the statute's definition of "Indian child."<sup>198</sup> Unfortunately, neither the statute nor the interpretive guidelines issued by the BIA make this point clear.<sup>199</sup> The parents' ability to opt out of Indian status remains crucial to the *voluntary* nature of the reservation

194. 563 P.2d 885 (Ariz. 1977).

195. While the opinion expressed here matches statements made by Justice Stevens in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989) (Stevens, J., dissenting), it is not meant to imply any disagreement with the result reached by the majority opinion.

196. See WASHBURN, *supra* note 68, at 163-64. The tribe has final word on membership determinations under the Act. See Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979) [hereinafter BIA Guidelines]. For an idea of the difficulties that can be involved in a membership determination, see *In re Junious M*, 193 Cal. Rptr. 40, 43-46 (1983).

197. See generally Annotation, *Validity, Construction, and Application of the Uniform Child Custody Jurisprudence Act*, 96 A.L.R.3d 968 (1979). A minor point about which there might be a question is the juxtaposition of "residence" with "domicile" in the language of section 1911(a). While this might be read to imply that a tribe could exert jurisdiction based on presence, such a reading is unlikely and probably was not intended. See generally 25 AM. JUR. 2D *Domicile* § 4 (1966) (residence defined). The issue receives no attention in either H.R. REP. No. 1386, *supra* note 17, or in the Department of Interior guidelines on the Act. See BIA Guidelines, *supra* note 196.

198. See 25 U.S.C. § 1903(4) (1988) (Indian child defined).

199. The House Report to the 1978 Act stated that "[w]e do note that, for an adult Indian, there is an absolute right of [expatriation] from one's tribe." H.R. REP. No. 1386, *supra* note 17, at 20. But the BIA Guidelines state that "[t]he determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive." BIA Guidelines, *supra* note 196, at 67,586.

system, and should, if necessary, be understood as an explicit requirement of equal protection. A reasonable construction of the statute could probably solve this problem without the necessity of reaching the constitutional questions. It is important to note that this issue did not arise in the case recently decided by the Supreme Court, *Mississippi Band of Choctaw Indians v. Holyfield*.<sup>200</sup> In *Holyfield*, the parents never attempted to completely sever their tribal relationship, but only to temporarily escape tribal jurisdiction.

## 2. 25 U.S.C. § 1911(b) Transfer of Proceedings

Also potentially controversial is the section of the ICWA requiring that, for Indian children not qualifying for exclusive tribal jurisdiction: “[T]he court, in the absence of good cause to the contrary, shall transfer such proceedings to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent, or the Indian custodian or the child’s tribe. . . .”<sup>201</sup> The definition of Indian child is unchanged. Such a child may, as discussed before, be born to a tribal member and a non-Indian. One can easily imagine a situation where a child, not enrolled as a tribal member, not domiciled on the reservation, perhaps living with a non-Indian parent, and completely lacking in contacts with traditional Indian society, could — theoretically — be subject to transfer of proceedings to tribal court.

Fortunately, Congress built two safeguards into the ICWA: first, the ICWA gives either parent the right to object and block transfer, and second, a state court can find “good cause” to deny transfer. Together, these provisions adequately safeguard individual rights and save the section from most equal protection challenges.

Jurisdiction under the ICWA seems at first glance to have characteristics of both territorial and federal subject matter jurisdiction. But the Supreme Court has described the jurisdictional issues raised by the state court Indian child custody cases to be subject matter questions.<sup>202</sup> Presumably, Congress has the power to take any issue concerning tribal Indians and assign it exclusively to either federal

200. 490 U.S. 30 (1989). See *supra* notes 178-79 and accompanying text.

201. 25 U.S.C. § 1911(b) (1988). This section applies only to foster care and termination of parental rights proceedings. But consider that over 75% of the 1.5 million Americans describing themselves as ethnic Indians live outside of any reservation. In California, 96% of the 230,000 ethnic Indians live outside the reservation system. Many of these individuals are presumably fully assimilated into non-Indian society. U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION, vol. 1, ch. D, pt. 1, § A, tbl. 253 (Mar. 1984) (Detailed Population Characteristics, United States Summary); *id.* vol. 1, ch. D, pt. 6, § 1, tbl. 194 (Nov. 1983) (California); *id.* vol. 2, pt. 2, § 1, tbl. 2 (Jan. 1986) (American Indians, Eskimos, and Aleuts on Identified Reservations and in the Historic Areas of Oklahoma (Excluding Urbanized Areas)).

202. See *Fisher v. District Court*, 424 U.S. 382, 383-84 (1976); See also *In re Durvea*, 563 P.2d 885, 886 (Ariz. 1977).



or tribal court.<sup>203</sup> All that Congress needs is constitutional power over the subject matter, which is, in effect, the individual Indian in question. One might therefore assume that the traditional procedural due process rules that apply to territorial jurisdiction do not apply here. Real or implied consent, for example, normally remains an adequate basis for a court to exert territorial jurisdiction,<sup>204</sup> but not for subject matter jurisdiction. If this were just a question of territorial jurisdiction, then the parental consent option under section 1911(b) could itself provide an adequate jurisdictional basis for the transfer of proceedings to tribal court.

On the other hand, subject matter jurisdiction only extends as far as the delegated powers of the federal government. It would thus seem necessary to investigate the limits of the federal power over Indian affairs, at least as to ethnic Indians not enrolled as members of officially recognized tribes. The Supreme Court previously encountered this question in *Sandoval*, in *Nice*, and in *Morton*. But why not simply let the consent of the parent define the family's Indian status, and thus serve as the basis for subject matter jurisdiction? Let the parent, by the consent option, decide if they are in fact an "Indian" so as to fall within the federal Indian power. It is unlikely that anyone lacking a tribal identification would be willing to submit to tribal jurisdiction. While one can imagine the existence of a conflict of interest between the parent and the child, if the parent believed tribal courts would apply more lenient removal standards towards a neglectful or abusive parent, this possibility does not seem sufficient to justify restricting the parent's jurisdictional options. A parent's decision to live as a tribal Indian will inherently have consequences for that parent's child. The section 1911(b) situation is not significantly distinguishable from this general case.

A requirement that the child have minimum contacts with the forum tribe could, arguably, be read into the "good cause" exception to section 1911(b).<sup>205</sup> While courts normally use "minimum contacts" as a due process test for territorial jurisdiction,<sup>206</sup> they could use the

203. See *Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867); PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 479 (3d ed. 1988). See, e.g., *Wallace v. Adams*, 204 U.S. 415, 423 (1907) (recognizing Congress' authority to establish legislative courts to determine questions of tribal membership within Indian territory); *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 65 n.16 (1982).

204. See *Unterweser Reederei v. Zapata*, 407 U.S. 1 (1972); *National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964).

205. See *Jones*, *supra* note 187, at 1139 n.144.

206. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) ("due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'").

test here as an alternative method for defining subject matter jurisdiction, at least as a matter of statutory construction if not of constitutional law. A court would define an individual as "Indian" only if he possessed some minimal relationship with a reservation, such as membership or cultural ties. But the legislative history of the statute suggests that Congress merely intended "good cause" to be "a modified doctrine of *forum non conveniens*,"<sup>207</sup> and the BIA Guidelines<sup>208</sup> stress problems such as reservations lacking a tribal court, late transfer petitions, objections by a child over twelve,<sup>209</sup> and witnesses located away from the reservation.<sup>210</sup> In any event, the parental consent provision by itself appears to be an adequate measure of the substantiality of the child's relationship with the tribe, at least as to section 1911(b) transfers. The statute probably does not need an additional safeguard.

### C. Termination and Placement Rules in State Court

The ICWA does more than just transfer custody proceedings to tribal court; it also sets up special rules to govern state court proceedings in situations in which the state retains jurisdiction over the Indian child. These requirements potentially create more controversy than the jurisdiction transfers because they impact a broader group of individuals, some of whom will have only relatively insubstantial connections to reservation societies.

#### 1. 25 U.S.C. §§ 1912(e) and (f) Evidentiary Standards

The ICWA only allows a state court to make foster care placements if "clear and convincing evidence" exists that continued custody "is likely to result in serious emotional or physical damage to the child."<sup>211</sup> The Act only allows termination of parental rights if "evidence

207. H.R. REP. NO. 1386, *supra* note 17, at 21.

208. See BIA Guidelines, *supra* note 196, at 67,591 ("It is recommended that in most cases state court judges not be called upon to determine [sic] whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.").

209. The Department of Justice suggested that an older child's consent be made a statutory requirement for transfer. This makes good sense as it goes directly to the question of the child's status as an "Indian." See Letter from Assistant Attorney General Patricia Wald to the Hon. Morris Udall (May 23, 1978), *reprinted in* H.R. REP. NO. 1386, *supra* note 17, at 38, 40.

210. BIA Guidelines, *supra* note 196, at 67,591.

211. 25 U.S.C. § 1912(e) (1988).

beyond a reasonable doubt" shows that continued parental custody will cause such damage.<sup>212</sup> In either case, the court must support its decision by the testimony of "qualified expert witnesses."<sup>213</sup> These provisions apply to all children meeting the jurisdictional definition of "Indian child."

It is apparent that these provisions alter the standard of proof that is required before the court can issue a placement or termination order.<sup>214</sup> The idea is apparently to offset cultural bias on the part of the state courts. In a substantial number of cases the effect, unfortunately, is likely to be nothing more than simply requiring *more* abuse or neglect before the court can take action. Neglect in particular is not a yes-or-no determination to which a conventional evidentiary standard may easily be applied, but is a more complex question of degree.

Many of the children subject to these provisions were born to biracial relationships and may have no meaningful contacts with the reservation. For example, the existence of a father, enrolled as a tribal member, who has never even seen his illegitimate child, might be sufficient to invoke these provisions.<sup>215</sup> Several years ago the California Court of Appeal applied the ICWA in *In re Junious M. v. Diana L.*<sup>216</sup> In *Junious M.*, the mother, part Filipino and part Nooksack Indian, did not know whether or not she was a tribal member, and apparently had never lived on the reservation. The illegitimate child's father, part Indian and part black, did not participate in the proceedings. The appellate court held itself required to apply the Act, even though the trial court found that the eight-year-old child "had developed no identification as an Indian."<sup>217</sup> A case note on *In re Junious* described it as a "serious flaw" that courts should subject "children to whom Indian status is a complete

212. *Id.* § 1912(f).

213. The BIA Guidelines make it clear that this means an individual knowledgeable about "prevailing social and cultural standards and child rearing standards within the Indian child's tribe." BIA Guidelines, *supra* note 196, at 67,593.

214. "By imposing these standards, Congress has changed the rules of law with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be 'in the best interests of the child' for him or her to live with someone else. . . . It must be shown that it is dangerous for the child to remain with his or her present custodians." *Id.* at 67,593.

215. This problem is mitigated by the definition of "parent," which "does not include the unwed father where paternity has not been acknowledged or established. . . ." 25 U.S.C. § 1903(9) (1988).

216. 193 Cal. Rptr. 40 (1983).

217. *Id.* at 46.

fiction and who are indistinguishable from other inner city, poor minorities" to standards designed to protect culturally differing child rearing practices.<sup>218</sup>

The parental consent and "good cause" safeguards that were part of section 1911(b) are not available here. As such, courts will subject ethnic "Indian" children (often of a very low Indian blood content) to differential treatment in state courts, without the consent of their parents, in situations where the child may lack significant contacts with a reservation, based solely on the fact that one of the biological parents is (or was prior to death) a member of a recognized tribe. Moreover, it is likely the child will not be an tribal member. The child's domicile and residence will be in the state, not on a reservation. In the more extreme situations, such a child cannot meaningfully be said to be subject to special federal regulation pursuant to the Indian affairs power. By default, courts should treat the section 1912 provisions — as applied to such individuals as racial discriminations properly subject to stringent judicial review.

The Department of Justice made essentially the same point in a letter sent to the relevant House and Senate committees in 1978.<sup>219</sup> The Department, however, relied on a state's rights theory: "It seems to us that the Federal interest in the off-reservation context [discussing the reach of the Indian Commerce Clause] is so attenuated that the Tenth Amendment and general principles of federalism preclude the wholesale invasion of state power contemplated by section 102 [25 U.S.C. § 1912]."<sup>220</sup> A Tenth Amendment argument and an equal protection argument may, as a practical matter, be the same thing. Both depend on the assumption that Congress has gone beyond the allowable scope of its power under the Indian Commerce Clause. As discussed previously, this comment focuses on equal protection out of a belief that the modern case law is more receptive to arguments based on individual as opposed to states' rights.<sup>221</sup>

Defining exactly at what point this line is crossed is still a difficult problem. Moreover, there is an alternative argument: that the courts should defer to the congressional determination of who is an Indian, as the Supreme Court did in *United States v. Sandoval* and *United States v. Nice*. One response is that courts should apply the political

218. David Null, Case Note, *In re Junious M.: The California Application of the Indian Child Welfare Act*, 8 J. Juv. L. 74, 74 (1984).

219. Letter from Assistant Attorney General Patricia Wald to the Hon. Morris Udall (May 23, 1978), reprinted in H.R. REP. No. 1386, *supra* note 17, at 39-40.

220. *Id.*

221. See *supra* notes 146-49 and accompanying text. Keep in mind also that the Department's letter was written after *National League of Cities v. Usery*, 426 U.S. 833 (1976), but before *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 928 (1985).

question doctrine, and judicial deference generally, only to the question of the eventual termination of congressional power over Indian tribes, not to questions involving the status of *individual* Indians. *United States v. Crook* thus would remain good law.<sup>222</sup> Perhaps an even stronger response, however, is that a law discriminating *adversely* against a racial minority must be held unconstitutional if there is to be any consistency with the great body of existing case law. If this were merely a "benign" discrimination, as was the case in *Morton v. Mancari*, a judicial review of the boundaries of the federal Indian power might be less justifiable. But creating a special federal standard of proof in abuse and neglect cases, designed to be more stringent than the normal state standards, will likely result in harm to any child who lacks sufficient ties with traditional Indian society to make plausible a claim that the state court might be culturally biased.<sup>223</sup> The child must experience *more* abuse or neglect before the state can take action.

While an equal protection challenge on behalf of such a child should succeed, no such cases appear to have been brought over the last decade. This may be because no party has an incentive to assert an equal protection claim on behalf of the child: the parents' interests lie directly contrary to the child's on the standard of proof question. At the same time, any statutorily defined standard of proof probably remains sufficiently vague that a trial court, sitting without a jury, could effectively ignore it without being reversed on appeal. This may well be what many courts do today, and might further explain why relatively few problems have surfaced with these provisions.

Nevertheless, the ICWA should condition the operation of the special standard of proof on the existence of some minimal relationship between the child and the reservation; a relationship that should include ongoing cultural or family ties substantial enough to make the child more a product of Indian than non-Indian society.

## 2. 25 U.S.C. § 1915 Placement Preferences

When a state court makes adoptive placements of Indian children, the Act requires the court to prefer placements with the child's extended family, with other members of the tribe, and with other Indian families — in that order.<sup>224</sup> A similar provision exists for foster care placements, although here the placement should also be

222. See *supra* notes 138, 160.

223. In other contexts, the Supreme Court has held that a child should not be subject to adverse legal discrimination because of factors beyond the child's control. See *Levy v. Louisiana*, 391 U.S. 68, 71 (1967) (holding state discrimination against illegitimate children unconstitutional).

224. 25 U.S.C. § 1915(a) (1988).

“within reasonable proximity to his or her home.”<sup>225</sup> In both cases a “good cause” exception exists, and the child’s tribe may substitute an alternative placement list.<sup>226</sup> Moreover, section 1915 provides that “[w]here appropriate, the preference of the Indian child or parent shall be considered. . . .”<sup>227</sup> These provisions apply to all children meeting the jurisdictional definition of “Indian child.”

At the outset, courts could solve the over-inclusiveness problems that plagued the standard of proof provisions in section 1912 via either the good cause exception or the parental preference provision. However, it is clear from the BIA Guidelines that Congress did not intend the BIA Guidelines’ section 1915 good cause provision to serve as a judicially imposed limitation on the definition of an Indian child. The court should generally confine itself to more mundane considerations.<sup>228</sup> At the same time, the Guidelines do suggest that a request from the parents or an older child not to follow the placement order should be sufficient to constitute good cause.<sup>229</sup> But the legislative history states that the parent’s request “is not meant to outweigh the basic right of the child as an Indian.”<sup>230</sup> If the parents or older child genuinely have the right to opt-out of the placement preferences, the statute would be free from most of the problems associated with the inclusion of children who are not meaningfully “Indian.”

Even assuming that children who do not legitimately come within the congressional power over Indian affairs are covered by the placement preferences, however, these children do not obviously have an equal protection claim.<sup>231</sup> In comparison with the standard of proof provisions, it is less apparent that an affected child is being harmed. For example, placing a child in a similar racial or cultural environment is a common procedure in adoptions.<sup>232</sup> Although neither the

225. *Id.* § 1915(b).

226. *Id.* § 1915(c).

227. *Id.*

228. BIA Guidelines, *supra* note 196, at 67,594 (“The request of the biological parents or the child when the child is of sufficient age. . . . The extraordinary physical or emotional needs of the child . . . . The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.”).

229. *Id.* At the same time, the BIA Guidelines recommend that any party urging that an exception be made bear the burden of proof that such an exception is necessary.

230. H.R. REP. No. 1386, *supra* note 17, at 24.

231. Of course, the state would still be able to argue that its reserved powers were infringed. This was the position of the Department of Justice as to these provisions. Letter from Assistant Attorney General Patricia Wald to the Hon. Morris Udall (May 23, 1978), *reprinted in* H.R. REP. No. 1386, *supra* note 17, at 40-41.

232. Testimony of the National Committee for Adoption, William L. Pierce, Ph.D. (May 11, 1988), *in* 1988 Hearing, *supra* note 10, at 184. *But see Foster Placement by*

Supreme Court nor the federal courts of appeal have ever ruled directly on this issue, there is good reason to expect that the Court would treat such racial preferences as a non-objectionable, "benign" discrimination.

The most closely related Supreme Court case, *Palmore v. Sidoti*,<sup>233</sup> can readily be distinguished. *Palmore* forbade the removal of a child from the custody of its natural mother when she remarried a man of another race: "[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."<sup>234</sup> Section 1915 concerns a placement, rather than a removal, and assumes not that the child will be subject to racial prejudice in a different racial and cultural setting, but that the child will adapt more easily to a biologically and culturally matching family. Additionally, of course, Congress designed the Act to preserve the existence of autonomous Indian tribes.

This is not to say that it would make any particular sense to place an urban, multiracial "Indian" child with a traditional Indian family. Rather, the problems with such a placement simply may not rise to the level of an equal protection violation, at least from the viewpoint of the child. If it could be demonstrated that the placement rules harmed a child, however, one might still make an equal protection case on the child's behalf.

A parent might succeed with an equal protection challenge made on their own behalf, rather than on behalf of the child, but the point remains tenuous. Once a court orders a final termination of parental rights it is doubtful that the parents still have standing to sue. The parents certainly retain their rights during a temporary foster care placement, but the state also assumes an interest in the well-being of the child. Presumably, the court removed the child because of the abuse or neglect of the parents. At the same time, it seems unsatisfactory that the child would be placed in an Indian home if that were directly contrary to the preference of the parents.

The placement preferences are similar to several other procedural requirements imposed by the ICWA. For example, the Act requires

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*Skin Tone Seen: A.C.L.U. Says New York City Sorts Children by Shade for Private Agencies*, N.Y. TIMES, Jan. 18, 1990, at A18 (alleging that New York inappropriately uses race as a criterion in sending children to private foster-care agencies). At the same time, note that the situation suggested in the text (same culture matching) is the *opposite* of the situation that arises where a culturally or racially non-Indian child is placed with a traditional Indian family.

233. 466 U.S. 429 (1984).

234. *Id.* at 434.

that notice be given to the child's tribe,<sup>235</sup> and that the tribe have the right to intervene at any point in the proceedings.<sup>236</sup> The parent of a child lacking sufficient contacts with traditional Indian society to qualify as a true "Indian," and hence arguably outside the reach of the congressional power over Indian affairs, might find it worthwhile to challenge the constitutionality of any of these procedural mechanisms if they could demonstrate some harm to the child or family.

### III. Senate Bill 1976: The Proposed Amendments

The ICWA undertakes a difficult balancing of individual rights and tribal interests, and at times operates close to the line that divides a legitimate exercise of the federal power over Indian affairs from the constitutional protections of an individual from racial discrimination. This comment has argued that in some fact situations the original legislation already crosses that line. Congress may believe it necessary to push the constitutional limits of federal power in order to deal with a crisis situation in the Indian family. Unfortunately, the amendments Senator Evans proposed in the 100th Congress go beyond anything that could reasonably be required to correct abuses by state courts, and perhaps appropriately, if bluntly, have been described by former Secretary of the Interior Donald Hodel as "pure racism."<sup>237</sup> Part III of this comment briefly examines the more

235. 25 U.S.C. § 1912(a) (1988).

236. *Id.* § 1911(c).

237. This label was applied by the former Secretary in a letter sent to the Senate Select Committee on Indian Affairs in May 1988. His objections centered around jurisdictional provisions that compelled ethnic Indians, with little or no contact with the reservation, to submit to tribal courts. Letter from Secretary of the Interior Donald Hodel to the Hon. Daniel Inouye (May 11, 1988), in *1988 Hearings, supra* note 10, at 113. The Secretary's argument follows:

*First.* The bill is anathema to the salutary constitutional principle that legislation cannot stand if it makes classifications and distinctions based on race. If enacted, this bill would subject certain Indian children to the claim of jurisdiction of an Indian tribe solely by reason of the children's race. For example, under Section 101(b) of the bill, if a tribe seeks transfer of a child custody or adoption case from the state court to the tribe, the parents' objection to such transfer will be unavailing unless the objection is "determined to be consistent with the best interests of the child as an Indian . . ." (emphasis added). The provision ignores all other aspects of the child's status as a human being. That, in my view, is pure racism.

The Fourteenth Amendment to the Constitution was adopted to protect the rights of the individual against classifications based on the individual's race. This bill cannot be reconciled with that guiding principle. It is not enough to say "but, this is 'Indian legislation.'" Indians are,



significant of the proposed changes in light of the discussion of equal protection standards contained in part II.

A. *The Jurisdictional Provisions of Senate Bill 1976*

1. *Section 101(a) Exclusive Jurisdiction*

As in the ICWA, the proposed amendments would give the tribal court exclusive jurisdiction where the Indian child resides or is domiciled on the reservation. The significant changes are in the definitions of "Indian child" and "child custody proceeding," changes which are applicable in other portions of the bill. An "Indian child" would now include any unmarried person under eighteen who is a member of the tribe, or is eligible for membership in the tribe, or is of "Indian descent and is considered by an Indian tribe to be part of its community."<sup>238</sup> Moreover, "if a child is an infant he or she is considered to be part of a tribal community if either parent is so considered."<sup>239</sup> The definition of "[c]hild custody proceeding" would now embrace "an Indian child regardless of whether the child has previously lived in Indian country, in an Indian cultural environment or with an Indian parent."<sup>240</sup>

Obviously, neither the child nor *either* of its parents need be an enrolled member of the tribe for these definitions to apply. Under the ICWA, at least one of the biological parents has to be an actual member before the provisions of the Act apply. But under the proposed amendments, the tribe need only claim that it considers one of the parents to be "part of its community." At least theoretically, any ethnic Indian in the country could meet these definitions.

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and certainly should be, entitled to the basic protections of the Constitution even when those protections would be denied by "Indian legislation" See *Hodel v. Irving*, 107 S.Ct. 2076 (1987) (Just Compensation Clause of the Fifth Amendment).

*Id.* The *Washington Post*, in its editorial columns, endorsed the Secretary's views. Editorial, WASH. POST, May 22, 1988, at C6. Senator Inouye, the Chairman of the Senate Select Committee on Indian Affairs, apparently did not agree with either Secretary Hodel or the *Post*. Consider, for example, one of the questions he asked Ross Swimmer, Assistant Secretary for Indian Affairs, during the latter's congressional testimony:

THE CHAIRMAN. The clear conclusion that I have reached from your statement is that this is a bad, bad bill and that "the bill should not be enacted." Now, having said that, am I correct to conclude that you believe the present law is sufficient, proper, non-racist, and American?

Testimony of Ross Swimmer, Assistant Secretary for Indian Affairs (May 11, 1988), in 1988 *Hearing*, *supra* note 10, at 58.

238. S. 1976, § 4(5).

239. *Id.*

240. *Id.* § 4(1).

There is hardly more than a pretense that this classification is political, rather than racial. The Supreme Court used the rational basis test in *Morton v. Mancari* on the assumption that Indians would be regulated "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities."<sup>241</sup> Such reasoning could not properly be applied to Senator Evan's proposal.

Admittedly, the exclusive jurisdiction provisions of section 101(a) represent a less serious problem than other portions of the bill, since either residence or domicile on the reservation would be required. But the parent appears to have lost the option of resigning his or her membership as a final method for escaping tribal authority.<sup>242</sup> The parent might attempt to resign, but the tribal authorities could still claim that that person was "considered to be part of a tribal community" and hence still an "Indian" for purposes of the ICWA. Any provision that subjects an adult individual, an American citizen, to tribal jurisdiction should ultimately be traceable to the consent of that individual. Although in the interstate context domicile may be a sufficient basis for jurisdiction, tribal jurisdiction over child custody matters should require something more. Without some form of genuine consent, the very existence of Indian reservations could become a form a racial discrimination. In this situation, unless at least one of the parents is presently an actual member, an equal protection challenge on behalf of the parent should succeed.<sup>243</sup>

## 2. Section 101(b) Transfer of Proceedings

The problems with the section 101(b) transfer of jurisdiction provisions are more serious, and if enacted would unquestionably result in a violation of equal protection rights when applied in some fact situations. The same all-inclusive definitions of Indian child and child custody proceedings apply under section 101(b), but, contrary to the situation under section 101(a), the families affected will not reside or be domiciled on the reservation. Nor need the family reside anywhere near the reservation. In fact, most of the individuals who would qualify for transfer of jurisdiction probably live in Los Angeles, New York, or other major urban centers — hundreds or thousands of miles from the reservation.

The state court "shall transfer" the custody proceedings to tribal court "absent an unrevoked objection by either parent *determined*

241. *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

242. See *supra* notes 198-200 and accompanying text.

243. This view is in accord with that expressed by the Department of Justice in 1978, and is one of the questions that the Supreme Court expressly refused to address in footnote 7 of *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977). See *supra* text accompanying note 176.

to be consistent with the best interests of the child as an Indian" upon the request of either parent, an "Indian custodian," or the child's tribe.<sup>244</sup> Not only do the proposed amendments expand the coverage of the Act by the change in the definition of an Indian child, but the parents' option of not consenting to transfer is, to all intents and purposes, taken away.

The consent provision in the original Act serves as a method by which the parents can define themselves as Indian, so as to be properly subject to the federal power over Indian affairs and to tribal jurisdiction.<sup>245</sup> The addition of the caveat that the objection must be consistent with "the best interests of the child as an Indian" destroys this function of the consent requirement. Some sort of limitation along these lines should be constitutionally required if the transfer to tribal court is not to constitute an impermissible denial of access to state court on the basis of race.

The "good cause" provision in section 1911(b) of the ICWA has the potential of serving as a second constitutional safeguard — if the state court were allowed to find that a lack of significant contacts on the part of the child with the reservation constituted good cause not to transfer.<sup>246</sup> The possibility of such an exercise of discretion under the statute by the trial court would be entirely foreclosed by the elimination of the good cause provision from Senate Bill 1976. Under Senator Evan's bill, there is nothing to stop any ethnic Indian in the country from being forced involuntarily into tribal jurisdiction, except the right of the tribe itself to decline the transfer.

It seems beyond question that an equal protection challenge to section 101(b) by an adversely affected parent or child (who is not an enrolled member of a reservation)<sup>247</sup> should succeed. Such a challenge could be brought on behalf of either the child or its parents. Moreover, the parent would have an unusually strong claim as the Supreme Court has in the past described the right "to conceive and raise one's children" as "essential," among "the basic civil rights of man," and "far more precious than property rights."<sup>248</sup> The decision that contained this language, *Stanley v. Illinois*,<sup>249</sup> held that a father was "entitled to a hearing on his fitness as a parent before his children were taken from him," and that denying him the procedural rights which were available to other similarly situated parents violated

244. S. 1976, § 101(b) (emphasis added).

245. See *supra* notes 202-04 and accompanying text.

246. See *supra* notes 206-10 and accompanying text.

247. Arguably, an enrolled member should be required to at least attempt to resign his or her tribal membership before resorting to the expedient of an equal protection claim to escape tribal jurisdiction.

248. *Stanley v. Illinois*, 405 U.S. 645, 651 (1971).

249. *Id.*

his right to equal protection under the Fourteenth Amendment.<sup>250</sup> Courts should subject section 101(b), involving both a fundamental right and the most suspect of categories, race, to strict judicial scrutiny, even though it involves congressional regulation of ethnic Indians.

While section 1911(b) of the ICWA only covers foster care placement and termination of parental rights proceedings, section 101(b) would also cover voluntary adoptions.<sup>251</sup> Transfer or even just tribal intervention in a voluntary proceeding potentially represents a greater infringement on the rights of the parent than would be the case with involuntary removals. Moreover, it is difficult if not impossible to justify such an infringement as intended to offset a supposed bias on the part of state courts. The overinclusiveness problem once again creates constitutional difficulties: this provision should be limited to those who genuinely fall within the scope of the federal power over Indian affairs. And as a matter of policy, if not of constitutional law, even enrolled members should be given the right to decline transfer to tribal court.

## *B. Termination and Placement Rules in State Court*

### *1. Section 102 Evidentiary Standards*

The only changes made specifically to the standard of proof provisions are aimed making it yet more difficult to remove children. For example, “[e]vidence that shows only the existence of family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior” would not adequately justify a temporary or permanent removal unless it establishes a “direct causal relationship between particular conditions and the serious emotional or physical damage that is likely to result.”<sup>252</sup> While the ICWA requires the court to “provide remedial services and rehabilitative programs” prior to ordering a placement,<sup>253</sup> these efforts would now have to be “culturally appropriate” and involve the child’s tribe and off-reservation Indian organizations.<sup>254</sup>

None of these requirements would create an equal protection problem if Congress limited their application to families properly falling within Congress’ authority over Indian affairs. Congress may legitimately believe that the special situation of reservation Indians requires modified placement and termination standards. As discussed and

250. *Id.* at 649.

251. *See generally* S. 1976 § 103 (“Voluntary Proceedings”).

252. *Id.* § 102(g).

253. 25 U.S.C. § 1912(d) (1988).

254. S. 1976 § 102(d).

argued before, however, congressional authority does not embrace all ethnic Indians, but only those Indians possessing at least some minimal contacts with the reservation or traditional Indian society. The regulations could define the necessary contacts in terms of membership; residence or domicile on or near the reservation; specific consent; or perhaps even just substantial cultural ties. But Senate Bill 1976 has not made an adequate effort to establish such contacts as a condition to the operation of the proposed section 102. Instead, as mentioned previously, the bill broadens the definition of "Indian child" on which the section operates. As a constitutional matter, implementing section 102 is a step in the wrong direction.

In terms of policy, section 102 would further harm non-traditional ethnic Indian children by requiring yet more abuse or neglect before courts can remove children from their parents. Whether section 102 would help or harm children from traditional Indian families is a more difficult question. If Congress is correct in its assessment that such children are being needlessly removed from parental custody because of cultural bias in the state courts, then these adjustments to the standard of proof could well offset that bias and reduce the problem. However, the answer to this question is not directly relevant to the equal protection analysis presented in this comment, since this analysis only seeks to identify those families who do not politically or culturally qualify as tribal Indians, and who thus should not be included within special Indian legislation.

## 2. *Section 105 Placement Preferences*

At the outset, section 105 makes clear the intent of the placement preferences in the proposed amendments: "All placements of Indian children shall seek to protect the right of Indian children as Indians and the rights of the Indian community and tribe in having its children in its society."<sup>255</sup> Apparently, throughout Senate Bill 1976 and to a significantly greater extent than in the present Act, the first and primary goal is to preserve the existence of a separate Indian society within the United States. The "Declaration of Policy" at the outset of Senate Bill 1976, for example, concludes with the following statement: "Congress hereby declares its intent to protect the right of Indian children to develop a tribal identity and to maintain ties to the Indian community within a family where their Indian identity will be nurtured."<sup>256</sup> Moreover, it would seem that the sponsors of Senate Bill 1976 intend this principle to apply to all ethnic Indian

255. *Id.* § 105(a).

256. *Id.* § 3.

children, not just those who actually hold membership in tribes or live on reservations.

The proposed section 105, for example, contains the same mandatory preferences for placements with Indian families as does section 1915 of the ICWA. The significant changes, aside from the increase in coverage caused by the expansion of the definition "Indian child," lie in the unequivocal rejection of the right of the parent to opt-out of the preference scheme, and in the elimination of the section 1915 good cause exception. Under Senate Bill 1976, a preference expressed by the parent "shall be considered so long as the placement is made with one of the persons or institutions listed in subsections (b) or (c)."<sup>257</sup> In other words, only so long as the parents' prefer to place the child in an Indian environment. While the bill eliminates the good cause provision, it does allow a waiver of the preferences if a child of twelve or older objects or if suitable families cannot be found after "diligent search."<sup>258</sup> However, these provisions do not permit courts to violate the "rights of the Indian community and tribe in having its children in its society."<sup>259</sup> Any loopholes that might have allowed a state court to get out from under section 1915 have effectively been closed.

In practice, these changes may be less significant if only because the existing Act allows state courts very little room to maneuver on the good cause and parental objection provisions as it is. Nevertheless, the proposed changes, questionable as a matter of policy, dramatize the need to confine the reach of such provisions to traditional, reservation-oriented Indians. It is the expansion in the definition of "Indian child" that ultimately causes the most concern, and that most severely accentuates the equal protection objections to the existing legislation.

### *Conclusion*

Judicial recognition of a special federal power over Indian affairs is an admission that such regulation involves political judgments that courts generally cannot second-guess. At the same time, federal and state courts still have a responsibility to interpret the Constitution and to protect ethnic Indians as well as other groups from racially discriminatory legislation. Ultimately, we should not allow federal Indian regulation to cross this line.

Either Congress or the courts must ultimately define those Indians who come within the special regulation of Indian affairs in terms of their consent to that relationship. Voluntarily assumed and freely relinquishable membership in a tribe is the most obvious test. For

257. *Id.* § 105(e).

258. *Id.* § 105(c).

259. *Id.* § 105(a).

individuals living on or near a reservation, actual membership need not be an absolute requirement, so long as the individual consents in some way to the special treatment. For individuals living at a distance from the reservation, membership alone may not always be sufficient. Ideally, the off-reservation individual should specifically consent to the application of each particular piece of legislation.

While the existing ICWA predominantly concerns itself with the well being of Indian children and makes a sincere effort to balance individual rights and tribal interests, it nevertheless is potentially subject to an equal protection challenge in its standard of proof requirements, and very likely in its placement preferences as well. But where the ICWA legitimately expresses a congressional policy of promoting tribal self-determination and autonomy, the proposed amendments carry this policy almost to the point of involuntarily segregating ethnic Indians from the rest of American society. It is at this point that constitutional limitations should apply.

In most situations within the scope of this Comment, equal protection need only require that special congressional regulation of Indian affairs be based, either directly or indirectly, on the consent of the individuals concerned. Applying the special evidentiary standards for foster care placement and termination of parental rights proceedings in state courts is a potential exception,<sup>260</sup> requiring something more because of the incentive potentially created for the parent to opt-in and take advantage of the more stringent removal standards. Here, the law should appropriately require some additional minimal relationship to the reservation or traditional Indian society.

260. *Id.* § 102; 25 U.S.C. §§ 1912(e) & (f) (1988).